Cus. Manuit.

105

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT & BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE

LA COUR DES FAILLITES

DE

L'ILE MAURICE.

1867.

VOLUME SEVENTH

EDITED BY A. PISTON,

ATTORNEY AT LAW.

MAURITIUS.

L. CHANNELL'S STEAM PRINTING ESTABLISHMENT, LOUDRIÈRE STREET.

1867.

Louis Guillard

JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS,

EDITED

BY A. PISTON, ATTORNEY AT LAW.

1867.

SUPREME COURT.

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ORDRE,—PRIVILEGES,—GENS DE SERVICE,—APPEL D'UN JUGEMENT DU MASTER.

Les salaires des gens de service ne sont privilégiés que pour les deux années (l'année échue et ce qui est dû de l'année courante) qui ont immédiatement précédé la mort ou l'expropriation du débiteur.

Ce privilège n'existe pas pour les salaires qui ont précédé une saisie des biens du débiteur.

—

ORDRE, — PRIVILEGES, — LABORERS AND SERVANTS,—APPEAL FROM A JUDGMENT OF THE MASTER.

The wages of laborers or servants are secured by privilege only for the two years (one full year and the running year) which have immediately preceded the death or expropriation of the debtor.

Such privilege does not exist for wages preceding the seizure of the debtor's property.

—

A. LAMARRE,—Appellant.

versus

A. JOLY AND ORS.,—Respondents.

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Before:

The Honorable Mr. JUSTICE COLIN and
The Honorable Mr. JUSTICE ARNAUD.

S. J. DOUGLAS,—Of Counsel for Appellant.
J. BOUCHET. —Appellant's Attorney.
E. LECLÉZIO, —Of Counsel for Respondents.
V. BOULLÉ, —Respondents' Attorney.

—

1*st February* 1867.

This was an Appeal entered by Adrien Lamarre, against a certain Order or Judgment of Mr. Esnouf, Master of the Supreme Court, under date 6th August 1866, in the matter of the "Contredits" to the provisional distribution by way of "Ordre" of the sale price of the Estate *Village*, situate at "Vallée des Prêtres," and awarded to Antoine Théodore Joly, on the 20th of April 1865, for the sum of £11,875.

The reasons of Appeal set forth by the Appellant who claimed, by privileges, wages from June 1862 to April 1863, may virtually be, and were, during the argument, reduced in reality to this one point, whether the Appellant's claim was a privileged one; and the solution of the question depended upon this: whether the Master was right in decreeing that the time for which the Applicant's wages were due, was not included within the time (a year past and the current year) which renders such claim payable by preference out of the sale price of the Estate.

S. J. DOUGLAS, for the Appellant, contended that the claim was privileged, and came within the time mentioned by the Article 2,201 CODE CIVIL. His client had obtained a Judgment, and although the Estate seized so far back as 1856, had only been sold in 1865, yet the influence of the privilege must be thrown back to

reckon from the date of the Judgment. Although citing no direct authority on this peculiar point, he referred to :

DURANTON, Vol. 19, No. 63.
DALLOZ, Rep. Vo. Priv. 212.
PONT, des Priv. & Hyp. 1, § 91.

E. LECLÉZIO, for certain Respondents, Perdreau and Widow Dioré, contended that there would be no end of Privileges, if every man who got Judgment, could year after year, claim a privilege; the law had fixed a *terminus à quo*. The Appellant's authorities, which were not on the paragraph which ruled the matter, were, if properly read, quite in favour of the Respondent, and decidedly so when applied to the article itself.

E PELLEREAU was heard on the same side.

J. COLIN and G. GUIBERT claimed their costs as costs of "Ordre."

JUDGMENT.

The Article 2,101—4th Par., gives a privilege "sur la généralité des meubles" to "les salaires des gens de service, pour l'année échue et l'année courante;" and Article 2,104 holds that the privilege set forth in article 2,101, extend over real as well as personal property.

But from what moment is the "année échue" and "année courante" to reckon? Evidently from the moment that the servant began his service when the event, out of which arises the privilege, happens within the year after. But when several years have elapsed, and the servant's wages have become due, can he bring forward the time when they have been running, so as to bring it nearer to the event which gives rise to the exercise of the privilege?

If this were so, the consequence might be this, that one set of servants might have a privilege for, say, 18 months, then another set, and then a third set, and so on; and the sale price of the Estate be eaten up by privileges which, it does not appear to us the CODE contemplated, to the extent which the theory of the Appellant is driven to carry them to.

If the article is carefully read, it will be seen that the event which is contemplated as giving rise to the exercise of the servants' privilege, and of the privileges of those provided for by the other paragraphs of the same articles, is the death of the proprietor of the moveable property which is to be sold to meet such claim.

The spirit of the article has been found to apply to certain other determined events, and such as the sale of a real Estate, the owner thereof being turned out of the Estate when the same is sold, not when it is seized.

That is perfectly proper and not illogical; but, still, it is the sale of the Estate, that is the actual expropriation of the owner thereof, which must be the *terminus à quo* from which, reckoning backwards, the privilege should extend, covering then the running year, plus one full year due.

This view of the question tallies with the spirit of the Law which, whilst giving a privilege to servants and others, for a limited period, has declined to carry such privilege over a longer period

This privilege is a very strong one, it takes priority over hypothecs, and therefore must be restrained within the strictest boundaries set to it by the Law.

The Appellant urged that the estate was seized since 1856, but it was not sold; the owner was not dead, or expropriated, it might full well be that altho' the Estate was seized, it might not be sold at all; and the result would be fraught with danger to all hypothec holders and other real creditors if a privilege which, from the letter and spirit of the Law, arises at the death of the owner, or say at his expropriation, could be carried back over years and years to the date of a seizure.

No authority was quoted in support of the Appellant's view, which applied directly to the special privilege before us, but it was attempted to argue, from an authority applying to another privilege, that the Appellant's right might be reckoned as he attempts to reckon it.

Even as applied to that second privilege, Mr. PONT, par. 91, is not quite in favor of the Appellant. He admits that if the shop-keeper's action had been brought and its result delayed, on account of legal delays, until after the expiry of the six months or the year, as the case may be, the creditor should not be deprived of his privilege, that is true; but he, at the same time, distinctly lays down that "le privilège ne pourrait s'appliquer à des fournitures autres que "celles faites pendant l'année ou pendant les six "mois qui ont précédé immédiatement l'une ou "l'autre de ces dates";—and he cites a decision of the Court of BORDEAUX to that effect.

In this case nothing shows that Mr. Lamarre could not, after getting his judgment, force the execution of the same; if he chose to wait, no one compelled him to wait, no legal delays interfered to check the exercise of his privilege.

And that is exactly the view of DURANTON, who admits that "le marchand en gros ne peut être privé de son privilège parceque l'instance, la saisie et la vente des meubles, à sa requête ou à celle d'autres créanciers, ont entraîné des longueurs;" because "ces longueurs ne sont pas de son fait; elles sont le résultat des dispositions de la loi, etc., etc."

And when he speaks of the particular privilege which is before us, he says distinctly that if the wages due to the "gens de service" are due for a year anterior to that which immediately preceded the "année courante," the claim, though preserved, would exist as a claim, no doubt, but not as a privilege, for otherwise "il faudrait aller jusqu'à dire que le domestique pourrait venir exercer le privilège pour une année de gages dûs depuis 20 ans, et plus encore, parceque la créance aurait été utilement conservée par une reconnaissance du débiteur."

The only question left, then, is whether we can possibly assimilate the seizure of an Estate to the owner's death: Assuredly not; the sale of the Estate may and has been so assimilated; for by the sale of the Estate the owner is divested, and this may be so far called a legal demise *quoad* the Estate; but the seizure of the Estate does not divest the owner who may legally pay the debt up to the very last moment, and get the seizure erased then, and who, if the seizure though effected is, as it very often is, not carried on, may one year have one batch of "gens de service" who leave him or are dismissed, then another batch; and what would become then of the essense of that species of privileges which, in the words of DURANTON, exists for claims "qui seraient récentes ou d'une date peu ancienne," and according to the letter and spirit of the law, are clearly intended, all of them, to be for a limited time, so that the bulk of such privileges should not be dangerously large for the hypothec creditors.

We, therefore, think the Master was right to refuse to allow the Appellant's claim, which is perfectly good as a *claim* against his debtor, to be collocated by preference to the other creditors having privileged or hypothec rights over the "*Village*" property.

We dismiss the Appeal, with costs, which, we are of opinion, the Appellant should pay.

We give the purchaser of the Estate his costs as costs of Order.

SUPREME COURT.

APPEL D'UN ORDRE DE JUGE EN CHAMBRES,—PROCEDURE.

APPEAL FROM A JUDGE'S ORDER AT CHAMBERS,—PROCEDURE.

CHAUVIN,—Appellant,

Versus

THE CEYLON COMPANY LIMITED,—Respondent.

Before:

His Honor the Acting CHIEF JUDGE, and The Honorable Mr. Justice ARNAUD.

J. L. COLIN, —Of Counsel for Appellant.
A J. COLIN, —Appellant's Attorney.
HON. V. NAZ,—Of Counsel for Respondent.
H. BERTIN, —Attorney for same.

12*th February*, 1867.

The only point to be decided at present, on this Appeal, is one of practice.

An application was made at Chambers on the 26th November last by Mr COLIN. The Judge's Order, on that Application, was appealed from by Felicie Chauvin.

Notice was given by the Appellant, of her Appeal, with a summons to the Respondents to be in Court on a given day.

On motion by Mr. J. COLIN that the Appeal be recorded and that it do take its rank on the cause paper,

Hon V. NAZ. of Counsel for the Respondents maintained that the appeal should be heard and disposed of *instanter*.

Parties heard, and after considering this matter, we have come to the conclusion that Appeals from Judge's Order should be heard on the day on which the Appeal is mentioned, unless the Court be prevented from entertaining the Appeal on that very day, either from pressure of other business or from the wish of both parties that the Appeal be taken up another day.

BAIL COURT.

VENTE DE MARCHANDISES,—MANDAT VERBAL,—PREUVES ET PRESOMPTIONS, — APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.

Preuves et présomptions en vertu desquelles il a été décidé qu'un commerçant était lié par les achats faits pour son compte par son employé.

SALE OF GOODS,—PRINCIPAL AND AGENT,—EVIDENCE AND PRESUMPTIONS TO PROVE THE AGENCY,—APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE.

Evidence and presumptions in consequence whereof it has been held that a trader was bound to pay the sale price of goods purchased for the account of such trader by his clerk.

A. BERNARD,—Appellant,

versus

SUQUET & Co.,—Respondents.

Before:

His Honor the ACTING CHIEF JUDGE.

P. L. CHASTELLIER,—Of Counsel for Appellant.
U. HITIÉ, —Appellant's Attorney.
L. COX ,—Of Counsel for Respondent.
M. SAUZIER,—Respondent's Attorney.

12*th February* 1867.

The Appellant, in this case, finds fault with the Judgment of the Court below, because the Ma-

gistrate has found him liable to the payment of $136.75 for goods sold and delivered to him, from 19th October to 10th December 1866, thro' the medium of his clerk to whom he alleges he never gave any authority to that effect.

I have carefully weighed the depositions of the witnesses heard; one of them, Geo. Jenkins May, swears that he often acted for the Defendant, now Appellant in buying goods from Coutanceau & Ors; that the Appellant paid for the goods so bought by him; that he was sent by Bernard to Suquet & Co., (Respondents) to buy the goods the value of which is now claimed; that those goods were duly received by the Defendant and duly entered in the receipt Book; that it was by order of Bernard, given to Loumeau in his (witness's) presence, that Loumeau drew orders on Suquet, for goods.

Suquet & Co's clerk swears to the delivery of the goods to May and Loumeau, for Bernard.

The facts sworn to of the purchase and delivery of the goods to Bernard's servants, the entry of those goods in the receipt-book of the Hôtel-Masse, which Bernard must be in the daily habit of referring for conducting the business of his Hôtel, the payments, by Bernard, of accounts for goods in like manner purchased from, and delivered by other traders, are in my opinion sufficient evidence that Appellant's servants were authorized to do what they swear to have done with their master's authority. Again, the payment by Bernard of the accounts run up at Coutanceau & ors by his servants, on previous occasions, are so many ratifications of the acts of his servants and which strongly militate in favor of the truth of the depositions of the witnesses heard in this case.

I shall and do, therefore, dismiss this Appeal, with costs.

SUPREME COURT.

—

DIVORCE,—ABANDON.

L'abandon du domicile conjugal par l'un des époux n'est pas, par lui-même, une cause de divorce, lorsqu'il n'est pas accompagné d'autres faits outrageants et injurieux.

La violation des Articles 212 *et* 213, *et particulièrement de l'Article* 214 *du C.C. peut être considérée, suivant les circonstances, comme un fait outrageant et injurieux pouvant motiver le divorce.*

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DIVORCE,—DESERTION OF THE CONJUGAL ROOF.

Desertion of the conjugal roof by one of the spouses is not, per se, a sufficient ground for a divorce. Some other fact of outrage must be joined with it.

The refusal or neglect by one of the spouses to perform the mutual obligations laid upon them by Articles 212 *and* 213, *and especially* 214 *of the C.C. may be, according to circumstances, considered as facts of outrage authorizing a judgment of divorce.*

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I..., THE WIFE,—Plaintiff,

versus

I..., THE HUSBAND,—Defendant.

—

Before:

His Honor the ACTING CHIEF-JUDGE, and
The Honorable Mr. JUSTICE ARNAUD.

—

THE HON. H. KŒNIG,—Of Counsel for Plaintiff.
E. LECLÉZIO, *Jr.*, —Attorney for same.

—

(Defendant not appearing.)

—

12*th February* 1867.

The Plaintiff, maried I..., on the 23rd September 1862, and on the 16th October immediately following, the latter deserted the Plaintiff, left her altogether unprovided for, up to this day. She has been depending upon her parents for her maintenance during the whole of that long lapse of time.

Thus abandoned and unprovided for by her husband, the Plaintiff brought this action for a divorce *à vinculo matrimonii.*

The husband has not pleaded to this action.

The evidence tendered by the Plaintiff shews that those facts could not be controverted.

The Honorable H. KŒNIG, on behalf of the Plaintiff, therefore moved that the divorce prayed for be allowed.

The conclusions of the "MINISTÈRE PUBLIC" were favorable to the Plaintiff's demand.

JUDGMENT.

It is now settled rule that, in law, desertion or abandonment by husband or wife, is not, of itself, a sufficient ground for a divorce. (*Arlanda* v. *Arlanda.* PISTON'S Reports, 1865, pages 3 and 4.)* Whilst, on the other hand, it is equally clear that desertion, joined with some facts of *excès, sévices* or *injures graves*, will warrant a *séparation de corps* or a divorce, in the Colony. (Same Case.)

In like manner, when either husband or wife refuses to perform the mutual obligations laid upon them by article 214 C. C. this is a sufficient cause for a Divorce. (Article 230 C. C. GILBERT'S notes, 27.)

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* See also Page 4—1864.

As much may be said of the mutual obligations laid on husband and wife by Articles 212, 213.

Article 212.—" Les époux se doivent mutuel-
" lement fidélité, secours et assistance."

Article 213.—" Le mari doit protection à sa
" femme, et la femme obéissance à son mari."

Article 214.—" La femme est obligée d'habiter
" avec le mari, et de le suivre partout où il juge
" à propos de résider : le mari est obligé de la
" recevoir et de lui fournir tout ce qui est né-
" cessaire pour les besoins de la vie, selon ses
" facultés et son état.

On the pretence of his presence being required in the country, the Defendant parted with his wife, left the conjugal roof to which he has never returned up to this day.

No sooner had he deserted wife and house, that *his personal safety required that he should leave the Island.* † During the whole of his absence in foreign parts, he led a most dissolute life.

He never wrote to his wife to inform her of his movements, though he had left the Island, without telling her whither he was going.

Before leaving his wife and whilst away from her, he never expressed the wish that she should either accompany or join him. He left her altogether unprovided for. Since his clandestine return to the Island, no notice of his wife, or of her wants, was ever taken by him, except it be his statement to two of the witnesses heard on the enquiry, that his distressed position was such that he could never think of taking back his wife, whilst the consciousness of guilt, on the other hand, hath hitherto deterred and will probably deter him from ever returning to one whom he has so cruelly deceived.

Under such circumstances, it is evident that the husband cannot perform his part of the marriage contract, at present, nor does it appear likely that he will ever be in a position to perform them.

If so, is the Plaintiff to be for ever unprotected by her husband ? Is she to be for ever unprovided for ? Is she to be for ever bound to one of whom she has every reason to blush, who has shewn such disregard to her feelings, and for ever blasted her hopes of future happiness ?

This we cannot allow, and conformably to the conclusions of the " MINISTÈRE PUBLIC, " we allow the divorce prayed for, and order that the Plaintiff do within the delay fixed by Law appear before the Officer of the Civil Status, who is hereby authorized to pronounce the divorce between parties,—on fulfilment of the requisites of the law, on this head. Costs against Defendant.

† See 1863, page 26.

SUPREME COURT.

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DEMANDE EN DIVORCE PAR LE MARI POUR INCONDUITE ET SEVICES DE LA PART DE SA FEMME.

—

DEMAND IN DIVORCE AT THE SUIT OF A HUSBAND FOR MISCONDUCT OF HIS WIFE—SŒVITIÆ.

—

Z** THE HUSBAND,—Plaintiff,

Versus

Z** THE WIFE,—Defendant.

—

Before

His Honor the ACTING CHIEF JUDGE, and
His Honor Mr. JUSTICE COLIN.

—

P. L. CHASTELLIER,—Of Counsel for the Plaintiff.
E. DUCRAY,—Plaintiff's Attorney.

—

17*th February* 1867.

This was a suit brought by Z. the husband to obtain, against his wife, a decree of divorce *à vinculo*, on the ground of *sævitiæ*.

It is not usual to find suits for a divorce in which the wife's cruelty to her husband, her indomitable temper, and violent excesses, form the framework of the application.

The Law, however, makes no distinction ; and *Sævitiæ* may be urged as a legal cause for divorce by the husband as well as by the wife, but it seems to stand to reason that the Court will require very strong evidence to show that the wife's conduct (her chastity not being impugned) is such that the marriage life has become intolerable to the husband, and that he cannot check those excesses or cause his wife to cease molesting and ill-treating him, we are driven, however, to say that this Plaintiff has been very ill-used, and seems to have acted with patience and kindness.

The wife appears to be an habitual drunkard and when in that condition, not only treated her husband, to say the least, very harshly, but seems, if we are to believe the man servant, and we see no reason not to believe him, to have not always remembered the common rules of decency ; she apparently reconciled herself very easily to her mode of life and intemperate habits, for Mr. Doyen tells us that she once admitted that : " Je suis soularde, c'est vrai, mais qui n'a pas ses défauts " ?

The quarrels between the husband and wife, invariably brought on by the wife, took place night and day ; had the house servants for witnesses, and were overheard by the neighbours ; she, finally, left her husband to go and reside at her grand mother's ; once she returned drunk,

with no shoes on and dressed in her "chemise." It would appear also that her intemperance was not occasional, but had grown into a constant habit; she concealed the bottles of spirits in her press, and under her bed, whilst she struck her husband and hurled candlesticks at his head with a more than ordinary accompaniment of coarse and vulgar epithets; he seems to have been kind, and when she had left him, continued to take care of her, so far as she would let him, for we have the evidence of Doorga Louis, to show that her meals were sent to her at her grand mother's house.

On the whole, then, we are of opinion that since a divorce can be granted on the ground of *sævitiæ*, this is a case where it may be granted, and we give a decree in favour of the Plaintiff who is hereby allowed to apply within the Legal delays to the Officer of the Civil Status of Port Louis, who is, by the present decree, authorized to pronounce a divorce *à vinculo matrimonii* between this Plaintiff and his wife.

SUPREME COURT

—

RÈGLEMENT DE COMPTES,—OUVERTURE DE CRÉDIT,—BILLETS A ORDRE,—CONSIGNATION DE SUCRE,—COMMISSION,—APPEL D'UN RAPPORT DU MASTER.

Confirmation du Rapport du Master refusant au Plaignant de prélever, sur une nouvelle avance, la commission au même taux que celle prélevée sur une première consignation de sucre à lui faite par le défendeur, cette nouvelle avance ayant été faite au défendeur après qu'il se fut complètement libéré vis-à-vis du plaignant, de la première dette.

—

SETTLEMENT OF ACCOUNTS,—OPENING OF CREDIT,—PROMISSORY NOTES,—CONSIGNMENT OF SUGAR,—COMMISSION,—APPEAL FROM THE MASTER'S REPORT.

Affirmation of the Master's Report, refusing to allow the Plaintiff to charge the same rate of commission on a subsequent advance of money made to Defendant than that already charged by him on the amount of a first consignment of sugar made to him by Defendant, the said advance having been made to Defendant at a time when he no longer was the Plaintiff's debtor.

—

GALDEMAR FRÈRES,—Appellants,

versus

V. MERVEN,—Respondent.

—

Before:

His Honor the ACTING CHIEF JUDGE and THE Honorable MR. JUSTICE COLIN.

—

W. NEWTON,—Of Counsel for Appellants.
E. DUCRAY, —Appellants' Attorney.
J. COLIN, —Of Counsel for Respondent.
E. DUVIVIER,—Respondent's Attorney.

—

1*st March* 1867.

This was an Appeal against a Report of the Master of this Court, dated October 5th 1866, and made upon a reference to him by the Court, on 21st September 1866, of certain accounts between Plaintiffs, now Appellants, and Defendant.

The sole substantial grievance alleged was that the Master had disallowed from the Plaintiff's account a sum of $ 475.79, being part of the commission by them charged against Defendant, according to an opening of credit, on 31st March 1861.

W. NEWTON, for the Appellants, maintained that the Master was wrong in his definition of the words "realization of sugars," which meant not the sale of the sugars, but the actual payment in cash of the sale price of the sugars, and if so, then the Plaintiffs were creditors upon the "ouverture de crédit" and were entitled to charge 5 per cent after the date, when the Master reduced this commission to 2½ per cent.

J. COLIN, for Respondent, argued that if the Plaintiffs had made further advances to the Defendant, after they had been paid in full their advances, they had done so, as the accounts themselves show, with the sugars of Defendant's Estate, but with no money of their own; but that the Defendant had completely fulfilled his obligation, and by the conditions of the "crédit" was not liable after this to pay more than 2½ per cent.

JUDGMENT.

By Articles 10 and 11 of the "Ouverture de crédit," it is stipulated: 1st, that if upon the realization of the 1,500,000 lbs. weight of sugar, which the Defendant had promised to consign to Plaintiffs, the Plaintiffs were reimbursed their advance of $ 35,000, the commission to which, by the same deed, they were entitled, would, for any surplus sugars, if any, be reduced from 5 to 2½ per cent. 2ndly. That the Defendant would hand over to Plaintiffs Promissory Notes for the amount of the sum which Plaintiffs were to advance.

The Defendant appears to have done so, and also to have consigned to the Plaintiffs a large quantity of sugars; the last Promissory Note handed over to Plaintiffs, appears to have been paid to the Mercantile Bank, on the 18th December 1860.

A priori, therefore, as there is a direct and immediate connection between the stipulated advance of $ 35,000 and the Promissory Notes given by Defendant and negociated by Plaintiffs, to that amount, the Plaintiffs on paying the last Promissory Note with the proceeds of the Defendant's sugars would be reimbursed their $ 35,000 in terms of the "Ouverture de crédit."

But it appears that the Plaintiffs made further advances which considerably increased their claim upon the Defendant, just as Defendant sent a far larger quantity of sugar than was required, to pay the original £35,000.

But it is plain that on the 18th December, the original credit of £35,000, which was covered by promissory notes specially given for that purpose, and to pay which, sugars had to be and were consigned, was paid, the last note having been withdrawn on that day.

But on that day it does not appear that the quantity of 1,500,000 lbs weight of sugar had been sent, and paid or not paid their advances; the Plaintiffs were entitled to a commission of 5 o|o on the proceeds of that quantity of sugar.

That commission the Master has allowed; but he disallows any larger commission than 2½ per cent on the excess of that quantity of 1,500,000.

In order to show that the Master was wrong, the Plaintiffs take up a date, that of the 21st February, and allege that at that time, as when the account current was closed, they were still creditors of the Defendant. Certainly they were, to a small amount, but it is to be observed that on that very day the advance they make to Thomy Merven for Victor Merven is made not with their own monies, but with monies raised on bills of Merven which they endorse or otherwise undertake to pay, but with monies belonging to Merven himself, the proceeds of Merven's own sugars. Can that be considered as an advance made by them for which they are to receive 5 o|o commission? It is evident that the reduction from 5 to 2½ as soon as the stipulated quantity of sugar has been consigned to them, is in order that they should not receive the same commission for payments made with Merven's own money, as for payments made with their own monies, or at least, monies raised by them on Merven's bills, endorsed, or secured by them.

Now, on the 21st of February, not only the original £35,000, but all advances, save a comparatively inconsiderable balance, has been repaid the Plaintiffs; on that day they received from Richardson & Co., on account of Merven's sugars, $17,496.56 c.; they are not only fully paid but if the matter remained thus, they would be debtors to Merven in a very large sum: that same money they choose to pay over to Merven; are they to receive 5 o|o commission? We think the Master was right and that the distinction is quite plain.

Importing into the original contract the further advances made by Plaintiffs, the Plaintiffs had on the 21st of February, received the quantity of sugars to be consigned, had sold and received the price and on that day, after payment of such price, all their advances were repaid, and more, a great deal more. If on that same day, but from the accounts subsequently to the first operation of receiving the money, they make a further advance, they do it under a commisssion, no doubt, tho' it be made almost entirely with Merven's money, but they do it under the 2½ o|o commission, not 5 o|o, which only covered a quantity of 1,500,000 received and £35,000 paid, with accessories and further advances. If it were otherwise, where should we stop? and provided at the end of the account, the balance were however slightly in favor of the original creditors the full commission would have to be charged. That, we gather from the contract, was not the intent of the parties, the intent was, we hold, that the Defendant creditor or debtor should suffer a commission of 5 o|o upon the price of 1,500,000 lbs. of sugar; but that quantity received, if he happened to have discharged his liability, then the commission was to be reduced. If, this once effected, the Plaintiffs make larger advances than the value of the surplus sugars they receive, we do not well see how the larger commission could be revived after its extinction in terms of Articles 10 and 11 of the "Credit."

The case might have been different and is, in most of such contracts, different where there is no special break stipulated in the contract and when the creditors never cease to be creditors, not for a moment; and the question might then have arisen whether the new advances beyond the £35,000 could be imported into the contract; but although meagre, the evidence shows, in this case that on the 21st February, the Defendant too paid his debt, and that the advance made, on that day, to Thomy Merven, of the proceeds of Defendant's sugars was made subsequently to the payment of the sugars to the Plaintiffs by the purchasers of such sugars; for we find from Merven's receipt, which is produced, that he received that sum of £17,496.56c. directly from Galdemar Frères & Co. who, there being no evidence to the contrary, must be presumed to have already received it.

We do not think it necessary to enter into the consideration of the meaning of the word realization, it appears to us that the case turns upon its own special facts and not upon the true intent and meaning of that word.

The Master's report is affirmed, with costs.

COURT OF ASSIZES

VOL,—FORME DE L'ACTE D'ACCUSATION,—EXCEPTION,—CODE PÉNAL COLONIAL, ART. 301,—ORDONNANCE SUR LA PROCEDURE CRIMINELLE, ART. 12.

L'Acte d'Accusation, pour vol, n'a pas besoin de contenir le nom du propriétaire de l'objet volé, il est suffisant d'y constater que l'objet volé n'appartient pas à l'accusé.

LARCENY,—CRIMINAL INFORMATION,—DEMURRER,—C.P.C., ART. 301,—CRIM. PROC. ORD. ART. 12.

In criminal Informations for Larceny, the owner of the stolen property need not be set forth; it is sufficient to shew that the property did not belong to the accused party.

THE QUEEN

versus

DOOKEE *alias* ALLEEYAR.

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Before:
His Honor Mr. JUSTICE ARNAUD.

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THE HONORABLE S. J. DOUGLAS,—Acting Procureur and Advocate General for the Crown.
E. PISTON,—Of Counsel for Prisoner.

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14*th March* 1867.

Dookee *alias* Alleeyar was indicted, under a criminal Information charging him with burglary; the Information concluding as follows: "the "said articles not belonging to him the said "Dookee likewise and otherwise called Alleeyar."

To this Information Mr. E. PISTON demurred on the ground that the owner of the stolen property ought to be stated in the Information; (quotes ARCHBOLD's *Criminal Procedure*, CHAP: 1. T. *Indict:* Sec: 3. Par: 2. Page 33.) "In "indictments for offences against the persons or "property of individuals, the christian name and "surname of the party injured must be stated "if the party injured be known; as for the murder "of *John Styles*, larceny of the goods of *John* "*Styles*, and the like."

By English Law the owner of the property must be stated; (quotes also Article 12th of the Criminal Procedure Ordinance which is as follows:) "The names of persons against whom "the offence is committed, or whose description "is involved in the statement of the offence, are "to be specified. Such persons are in general to "be described by their christian names and sur-"names, when they are known by such names, or "by names by which they are usually known."

S. J. DOUGLAS in answer: Article 301 of the PENAL CODE defines larceny to be the fraudulent abstraction, by any person, of property "not belonging to himself;" it is unnecessary to go beyond the requirements of the Penal Code. As regards Article 12 of our Criminal Procedure Ordinance, that Article only relates to offences where the name of the person is the essence of the offence, such as murder or assault, in which cases the name of the person murdered or assaulted must be given.

Mr. PISTON shortly replied.

JUDGMENT.

I have conferred with my brother Judges on the point raised by Mr. PISTON, and I find their opinion coincides with mine, that this demurrer cannot be maintained. The question has already, more than once, been decided by this Court.

We have no occasion to travel into text-books in cases clearly defined by our own law; Article 301 defines Larceny in this colony, and the Information coincides with the terms of the Penal Code. The requirements of our law appear to have been fully complied with in the Criminal Information now before me.

Demurrer accordingly overruled, and the Prisoner pleaded "not guilty."

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SUPREME COURT

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DROIT DE FOLLE ENCHÈRE,—LÉGATAIRE UNIVERSEL ET LÉGATAIRE PARTICULIER,—LICITATION,—CONFUSION,—APPEL D'UN JUGEMENT DU MASTER,—ORD. 36 DE 1863, § 7,—ART. 1654 DU C. C.

Le légataire universel qui se sera rendu adjudicataire d'un immeuble sur lequel la succession a une créance privilégiée ne pourra, lorsqu'il aura été chargé par l'acte de partage d'acquitter un legs particulier sur le montant de son prix d'adjudication, établir une confusion en sa personne, en vertu de sa qualité de légataire créancier et de débiteur.

Le légataire particulier ci-dessus dont le legs n'aura pas été acquitté pourra lui-même, lorsqu'un droit de revente résultera des clauses et conditions du Procès-Verbal d'adjudication, et faute de paiement du prix d'adjudication, faire revendre l'immeuble par voie de Folle Enchère.

L'Art. 7 de l'Ord. No. 36 de 1863 qui prescrit "qu'après l'extinction du privilége du vendeur, l'action résolutoire, établie par l'Art. 1654 du Code Civil, ne peut être exercée au préjudice des tiers qui ont acquis des droits sur l'immeuble, du chef de l'acquéreur, et qui se sont conformés à la loi pour les conserver," ne s'applique point dans certains cas au droit de Folle Enchère.

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RIGHT TO SUE A "FOLLE ENCHÈRE,"—UNIVERSAL AND PARTICULAR LEGATEES,—LICITATION,—"CONFUSION,"—APPEAL FROM A JUDGMENT OF THE MASTER,—ORD. 36 OF 1863, § 7,—ART. 1654 C. C.

The universal legatee, purchaser of an Immoveable property upon which the succession is a privileged creditor, shall not be at liberty, when he shall have been bound by the deed of partition to discharge a particular legacy, out of the amount of his price of adjudication, to effect a "confusion" in his person, arising from his characters of creditor legatee and debtor.

The above mentioned particular legatee, himself, whose legacy remains unpaid, shall be at liberty, when a right of resale shall have been provided for in the Memorandum of the conditions of sale of such immoveable, for non-payment of its purchase price, to cause a resale by way of "Folle Enchère," of the same, to take place.

Art. 7 of Ord. No. 36 of 1863, which provides that:

"after the extinction of the vendor's privilege, the resolutive action established by Art. 1654 *of the Civil Code cannot be exercised to the prejudice of third parties having over the property to which the privilege is applied rights derived from the purchaser and having conformed to the law for preserving their said rights" does not apply, in certain cases, to the right of suing a "Folle Enchère."*

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VALLET & ORS.,—Appellants,

versus

HEWETSON & ORS.,—Respondents.

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Before:

His Honor The ACTING CHIEF JUDGE, and
The Honorable MR. JUSTICE COLIN.

—

HON. HY. KŒNIG,—Of Counsel for Appellants.
F. ROBERT, —Attorney for same.
G. GUIBERT, —Of Counsel for Respondents.
H. BERTIN, —Respondents' Attorney.

—

22*nd March* 1867.

This was an Appeal brought against an Order of the Master of this Court, dated 17th April 1866, in the matter of the resale by way of "*Folle Enchère*" of the Estate "*Beauvallon*" situate in the District of Flacq, and prosecuted at the request of Marie Jeanne Fabre against Arthur Fabre.

When the cause came on for hearing before the Supreme Court, on the 15th August 1866, a suggestion was, by consent, entered of record, to the effect that the name of Wm. Hewetson, as assignee and holder of the rights of Marie Jeanne Fabre, be substituted to the name of the said Marie Jeanne Fabre. On the second day the cause was remitted back to the Master, in order that a certain document produced by the Appellants and purporting to be a copy of the deed of sale by Fabre to Phéline, of one half of the Estate "*Beauvallon*" be produced and argued upon.

The Master who had, by his first Order, held that no valid objection had been raised against the proceedings commenced by the said Marie Jeanne Fabre for the resale, by way of "*Folle Enchère*," of the said Estate '*Beauvallon*," discussed the application of Henry and Adolphe Vallet, the creditors who had objected to the "*Folle Enchère*," and adhered to his first Order.

The cause came on for trial before the Court, on the 26th February 1867, when:

HON. H. KŒNIG, for Appellants, urged that the Appellants objected to the proceedings by *Folle Enchère* taken by Miss Fabre. The Estate "*Beauvallon*" belonged to Arthur Fabre and Mme. Phéline. At the death of Mme. Phéline, the Estate was sold by licitation and bought by Arthur Fabre, alone. The sale by licitation took place between Arthur Fabre, in his personal name, and Phéline as guardian of the minor.

Miss Fabre does not appear in the licitation; Mme. Phéline left a minor child, and by her last will instituted her husband, Mr. Phéline, as her universal legatee; she also left certain particular legatees, and of those, Miss Fabre was one.

As Mme. Phéline had left a child, and as therefore she could not dispose of the whole of her property, the universal legacy had to be reduced, and the particular legatee became creditor of the universal legatee

Since the adjudication of the whole Estate "*Beauvallon*" to Arthur Fabre, he sold one half of it to Mr. Phéline, on the 4th November 1858. Miss Fabre remained a creditor of Mr. Phéline, not of the succession of Mme. Phéline, she never asked delivery of her legacy, nor was she sent into possession.

Phéline buying one half of the Estate, took upon himself the obligation of paying one half of the original sale price. Thus, creditor of Arthur Fabre as universal legatee, he became debtor as purchaser, and made a confusion, in his own person, of the claim and debt. Miss Fabre has no more rights than Phéline had, against Fabre, she had no right whatever.

Miss Fabre, it is true, may exercise her debtor's rights, but no more. What are those rights? Phéline is called upon to pay to the estate of his wife, instead of paying to Arthur Fabre. That is all. The Master in his Order has spoken of a suspensive clause; there is nothing of the kind. When the deed of partition was made in 1865, the Estate had been sold to Ireland, Fraser & Co.

It is not every creditor, besides, that has a right of *Folle Enchère*; that right belongs only to the parties to the licitation.

A party who has allowed his inscription to lapse, has no right to a *Folle Enchère*; but can one who has no inscription at all have such right? The ex-officio inscription taken does not contain the name of Miss Fabre.

G. GUIBERT, for Respondents: Mrs Phéline died in 1858: By her will she left to her child half of her estate; to Miss Fabre, her sister, she left £4.000, the rest she leaves to her husband, Mr. Phéline. Arthur Fabre, co-owner of the Estate, sued the licitation of it against the heir of Mrs. Phéline. According to the conditions of sale (No. 6) the purchaser was to pay the price at the deed of partition, and if the price be not paid, a *Folle Enchère* is the result. According to the deed of partition the half of the sale price, due by Arthur Fabre, is divided, and Miss Fabre is to receive £6,000 out of it.

It is said Miss Fabre had no mortgage; she could not have any; she has her legacy; but today she applies for the "*Folle Enchère*" not only

because she is a legatee, but on the strength of the original conditions of sale. The co-licitants alone could take an inscription; but the delegatee of a co-licitant profits by the inscription, so long as it is not given up.

TROPLONG: Priv: and Hyp: I. P. 363. 367. 318 *bis*.

The right of "*Folle Enchère*" is not exactly a right of resolution of sale, and the local Ordinance has not intended a "déchéance" to any other right except the right of resolution. It is a penal Ordinance; but we do not proceed under article 1,654 of the CODE.

FLANDIN 11. No. 1,207.
Vide article 9 of the Ordinance.

HON. H. KŒNIG in reply.

JUDGMENT.

The Respondents applied for a resale by *Folle Enchère* of the Estate *Beauvallon, a priori* upon perfectly legal grounds. The Estate was sold by licitation after the death of Made. Phéline, and purchased by Arthur Fabre. The conditions of sale were that Arthur Fabre should pay the purchase price according to a deed of partition that was to be drawn up. There was no alternative, no other mode of paying his price; and he was bound by that condition unless something has intervened to change or modify the obligation undertaken by Arthur Fabre. Now, Miss Fabre, according to the deed of partition, was to receive £6000 for a legacy left her by the late Made. Phéline, a co-proprietor of the *Beauvallon* Estate. Arthur Fabre by his "cahier des charges" was bound to pay her, therefore; he has not paid. The "Cahier des Charges." Article 9, submits the purchaser to the penalty of a *Folle Enchère* of the Estate, if the price be not paid; Miss Fabre has, therefore, a clear *à priori* right to sue for the *Folie Enchère*.

Now, has anything in law or fact, taken place which has altered the original contract of Arthur Fabre, the purchaser of *Beauvallon*, or has Miss Fabre done anything whereby she is now stopped from the practical user of her right arising out of the deed of partition and the conditions of sale under which Arthur Fabre bought? The Appellants contend that Miss Fabre has no right at all to cause the Estate to be sold by *Folle Enchère*; they urge that although it is true that Arthur Fabre bought under the condition that has been alluded to, yet he bought upon the licitation between himself and the minor heir of Made. Phéline who, in her life time was co-proprietor of the *Beauvallon* Estate.

Phéline her husband, it is urged, was her universal legatee, and Miss Fabre, the particular legatee, has no claim but a personal claim against Phéline, she has none against the Estate.

Now, after Fabre had become the purchaser of the whole Estate, he sold the one half of it to Phéline, and Phéline, the Appellants say, being debtor to Fabre, of the price of that moiety of the Estate and creditor of Fabre as universal legatee of his wife, makes a confusion of the claim and debt in his own person.

We are of opinion that this argument rests upon a complete fallacy.

Arthur Fabre, when he sold, could convey to his purchaser no other rights than such as he had had himself.

His rights of ownership were subject to the condition that he would pay in a certain way, and in no other.

By what right than, could he, so as to allow Phéline to make a confusion in his own person, sell the unpaid moiety of the estate in such a manner as entirely changed the original conditions of sale, without the consent, tacit or express, of those who were interested in receiving the purchase price in question?

Fabre might allow Phéline any conditions he pleased; but the creditors of the purchase price of the Estate, due by Fabre, are not bound by Fabre's deviation, unless they have, directly or indirectly approved of such deviation. Confusion operates, only when the same debt happens to be due to and due by the same individual.

Phéline owed the price of the moiety of the Estate to Fabre, but that price was not due by Fabre to Phéline personally or directly, it was due by Fabre, according to the deed of partition that was to be drawn up.

For ought Fabre could know, the price might not be payable at all to Phéline, and as the result showed, part of that price was made payable by Fabre to Miss Fabre; and so far as we can see properly so, Miss Fabre was legatee of the late Mrs Phéline; the price of half the Estate formed part of the assets of the late Mrs Phéline, if it was not the sole assets; it is but fair, *prima facie*, that the legatee should be paid out of the assets of the testator. With what show of reason or equity could Phéline, in the teeth of special conditions of sale, change the contract, apply the whole assets to himself, and now that the Estate is insolvent, turn to Miss Fabre and say to her: "Your rights were protected by the "conditions of sale, without consulting you, I "have changed all that, and you may have your "recourse against me personally."

The Appellants have no right to say more than what their debtor Pheline could have said. Things might certainly have turned out, as the Appellants contend, if we had not had the conditions of sale in question, to bind Arthur Fabre and the holders under him.

Now, has any deed or act been signed? has any fact intervened which has changed those conditions of sale, or whereby we might reasonably hold that Miss Fabre knew of what had been done and consented thereto?

There is no such act, no such fact; no alternative is left to Arthur Fabre or to his assigns; he must pay in one particular way, that particular

mode of payment is not altered or modified by any subsequent arrangement or contract or declaration to which Miss Fabre is a party; she has done nothing to show that she consented to Fabre paying Phéline, or receiving from Phéline in a manner different from that which was stipulated in the "Cahier des Charges."

It is true that the right of *Folle Enchère* is not given to every body; here it is distinctly expressed and granted by the "Cahier des Charges," (Article 9). It is true she has no inscription of hypothec in her own name, she could have none, she was no party to the licitation, but an inscription was taken for the minor, the vendor, the heir of the late Made. Phéline, and Miss Fabre, under the deed of partition is protected by that ex-officio inscription in case of need, for there is a clear and immediate connection between the conditions of sale and the deed of partition; a portion of the sale price is delegated to her. But the right of *Folle Enchère* does not always depend upon an inscription of hypothec. When it is made one of the very conditions of sale, it is cohesive with the sale, it form part of the contract and must be given effect to.

The right to sell by *Folle Enchère* is part of the contract between the vendor and the purchaser, the heirs, legatees or creditors, or assigns of the vendor having the same right as the vendor, provided they are collocated at the "Ordre", when there is one if the sale price or portion thereof is assigned to them by deed of partition or otherwise. That right of *Folle Enchère* is independent, therefore, of the inscription, it arises not out of the inscription, but out of the conditions of sale. "La poursuite de cette revente n'est pas un privilège réservé aux créanciers hypothécaires, ce n'est pas un apanage de l'inscription", says TROPLONG, Priv. & Hyp. III, 40, 72. We look at this case such as it is before us, *viz:* the right of Miss Fabre to sell by *Folle Enchère* as against the purchaser Arthur Fabre who bound himself to pay according to a deed of partition, and has not paid.

We wish particularly to guard ourselves against expressing any opinion as to the questions that might arise if Miss Fabre had been an ordinary hypothec creditor and had suffered her inscription to lapse whilst the Estate passed free into the hands of a third holder. These questions do not arise here; the *Folle Enchère* arises out of the conditions of sale especially, which conditions of sale required Arthur Fabre to pay in a certain way; there is here no question of ordinary hypothecs inscribed and suffered to lapse; whilst new rights emerged upon the basis that the Estate was free from encumberances, the original contract, so far as the parties before us are concerned, (and we say nothing of the rights of others) exists unchanged and unmodified.

It has also been urged by the Appellants that the new Ordinance touching transcription was a bar to the exercise of Miss Fabre's right of *Folle Enchère*. The Ordinance alluded to is No. 36 of 1863 which enacts, Sect. 6. that the vendor or co-proprietor may effectually inscribe their respective privileges under article 2,108, 2,109, CODE CIVIL, within 45 days of the deed of sale or division, notwithstanding the transcription of any deed in the interval: and section 7: That after the extinction of the vendor's privilege, the resolutive action established by article 1,654 of the CIVIL CODE, cannot be exercised to the prejudice of third parties having over the property to which the privilege applied, rights derived from the purchaser, and having conformed to the law for preserving their said rights.

From the Ordinance it was contended that Miss Fabre could not exercise the right of "*Folle Enchère*," because that right was nothing but a resolutive right.

The ordinance says nothing of "*Folle Enchère*" in the two sections founded upon, and certainly we could not easily hold that by assimilation or comparison, a right conferred by our written law could be taken away when the ordinance is silent on the point.

But, is in reality "*Folle Enchère*" nothing but the ordinary resolutive right given by article 1,654 of the CODE? No doubt it is so far resolutive that it destroys or annuls all rights of ownership in the person to whom the estate has been knocked down, and who has failed to fulfil the conditions of sale, but although greatly similar to common resolution in that sense, it shows many variations and differences from that other remedy.

Resolution of sale annuls absolutely the contract, so that the vendor recovers the estate sold, but, as a rule, returns such portions of the price he has received, the doctrine being that matters are thereby placed exactly as they were just before the contract, saving necessarily the respective rights of the parties to obtain compensation for plus value or deterioration.

The "*Folle-Enchère*," on the other hand, as it were, is but the continuation of the original proceedings for adjudication; so much so that the first price is maintained and the "Fol Encherisseur" is liable in any difference between the price he undertook to pay and the price fetched by the Estate upon its resale; so much that an "Ordre" settling the mode of payment between the parties who are entitled to the sale price is not annihilated as a rule, because the Estate is resold; the second purchase price is distributed according to the original settled scheme, modified it may be by the difference in the amount of the two sale prices. *Vide* SIREY 22. 1. 73. "Il (as TROPLONG "III p. 192 expresses it) ne fait que reporter sur "le nouvel adjudicataire les clauses comprises, "soit expressément, soit tacitement, au fol en- "cherisseur. Elle substitue le nouvel adjudi- "cataire à l'ancien et le soumet aux mêmes "conditions."

Again, resolution of sale proper, restores the Estate to the vendor; "*Folle Enchère*" does nothing of the kind, it entitles the vendor or creditor to be paid by the second "adjudicataire," instead of the "fol Encherisseur."

There are therefore, essential differences between the right of "*Folle Enchère*" and the resolution of Art. 1,654, and as the law has not taken away this remedy, we should not have the power, if we felt disposed, to add to the *déchéances* or forfeitures of right, enacted by the law.

Our Ordinance 36 of 1863 is almost similar, certainly similar in spirit to the new French Law of the 23rd March 1855. both are engrossed upon the same Codes ; by the enactment of the Ordinance here, the spirit of the French CODE modified by the New French Law is modified in exactly the same manner for us, and therefore we can have no more hesitation in seeking to be enlightened by the authority of the French Law Courts, than we should have if the modifying statutes had not been promulgated here as in France.

The law was here, before the Ordinance, as it was in France before the law of 1855. The original law of the CODE and the modification applied there has been applied here. In both countries the will of the legislature has been to do away, as far as reasonable, with occult hypothecs, and to compel the greater publicity of privileges and conveyances of real property.

Well, the Courts of France have held that the modifying statute was not applicable to the proceedings in *Folle Enchere*, although, says FLANDIN, II. page 370, " Elle ait pour objet " l'anéantissement du premier contrat et la re- " vente de l'immeuble " The Court of Appeal of Besançon D. 59.2.148, in the case of *Défeux* has held " that the law could not be extended to *Folle Enchère*." " Considérant que la pour- " suite de *Folle Enchère* n'est qu'un incident à " la poursuite de surenchère ; que la *Folle En- " chère* peut être suivie non seulement pour dé " faut de paiement, mais encore pour inexécution " des clauses de l'adjudication et par toutes per- " sonnes intéressées ; que cette voie ne peut être " assimilée à l'action en résolution de l'Art. 1,654 " CODE NAPOLEON, applicable seulement à une " vente définitive et au profit du vendeur ; que " la vente sur surenchère est faite sous la condi- " tion suspensive de l'acquittement des charges " et conditions de l'adjudication &a., &a.

That doctrine has been applied by the Courts of Bordeaux, in the case of the heirs *Giraud*, DAL, 61.2.66, and Grenoble, in the case of *Chabert* S. V, 59.2.611.

There is another decision of the Court of Besançon, on the same subject, that has laid down the same principle, grounding its views on the fundamental principle which we laid down above : " que l'article 7 de la loi, du 23 Mars " 1855, prononce une déchéance et doit par con- " séquent se limiter à ses termes précis, c'est-à " dir à la perte de l'action résolutoire établie " par l'art : 1,654 CODE CIVIL. FRIEDLER, D. " 60. 2. 29.

The system is the same for " Déchéances," or forfeiture of a right, arising out of a contract as for nullities, the laws that create them are penal, and *strictissimi juris*; they may be waived. they may be cured, parties may be estopped from pleading them, but they may never be extended.

We have for those reasons come to the conclusion that the Master's Decision ought not to be disturbed ; we affirm the same, and we dismiss the Appeal, with costs.

SUPREME COURT.

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FIRE INSURANCE, — APPRAISERS,—THIRD APPRAISER, — ARBITRATOR,—" AMIABLE COMPOSITEUR," — CHAMBER OF COMMERCE,—COMMERCIAL USAGE.

Mode of proceeding of the Chamber of Commerce who had to establish, in a final manner, the amount of damages to be paid by a Fire Insurance Company in execution of a Policy of Insurance.

Arbitrators have the right to appoint Appraisers to guide them in matters where they require light ; they have a discretionary power as to that.

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ASSURANCE CONTRE L'INCENDIE,—EXPERTISE,—TIERS EXPERT,—ARBITRE,—" AMIABLE COMPOSITEUR," — CHAMBREDE COMMERCE,—USAGE COMMERCIAL.

Mode de procéder de la Chambre de Commerce chargée par l'assurance et l'assuré de fixer " d'une manière souveraine " le montant du dommage en matière d'Incendie.

Un arbitre a droit de choisir des experts pour se faire renseigner sur la valeur de l'objet en litige.

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FANTONI, BONORCHIS AND CY.,—Plaintiffs.

versus

THE MAURITIUS FIRE INSURANCE CY., —Defendants.

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Before :

His Honor the ACTING CHIEF JUDGE and The Honorable Mr. JUSTICE COLIN.

—

A. LEGALL, —Of Counsel for Plaintiffs.
F. VICTOR, —Plaintiffs' Attorney.
J. COLIN, —Of Counsel for Defendants.
J. PIONÉGUY,—Defendants' Attorney.

—

1st March 1867.

This was an action brought by the Plaintiffs to recover from the Defendants the sum of £8,000, together with interest thereon, from June 11th 1866, for the value of certain goods and merchandize forming part of the stock in trade of

the Plaintiffs, which goods were insured by the Defendants on the 18th October 1865, for one year, under the following circumstances :—

It would appear that the Plaintiffs who are linen drapers, kept their shop in Royal and Corderie streets; on the 18th October 1865 they insured their goods and merchandize, which were stored in the said premises, for £8,000, with the Defendants, having already obtained from another Company "*The Union Mauricienne*" a policy on the same goods and merchandize, for the sum of £15,000; so that the whole risk was for £23,000, of which the present Defendants had, as aforesaid, taken £8,000.

It would also appear that on the night of the 10th to the 11th of June 1866 a considerable portion of their stock in trade was burnt or destroyed, as the Plaintiffs alleged, either by fire or by water used in trying to extinguish such fire, and this to the value of £18,000, which sum, the Plaintiffs said, far exceeded that for which the Insurance was effected with the Defendants.

After the usual averments that every condition of the policy which was to be fulfilled by the Plaintiffs, had been so fulfilled, and that the fire did not happen by means of any of the risks, which, according to the terms of the policy, had been excepted from liabilities, the Plaintiffs declaring upon such policy, claimed the aforesaid sum of £8,000.

The Defendants pleaded *inter alia*, that by the terms of the policy, it was agreed that in case of difference between the Plaintiffs' Appraiser, and the Defendants' as to the value of the property existing on the premises, at the date of the fire, the parties should refer such difference to the Chamber of Commerce and should abide by their valuation.

That, in execution of such agreement, the Chamber of Commerce, on the 27th July last, valued the stock in trade in the premises, on the day of the fire, at the sum of £12,531.79, and that such valuation was binding on both Plaintiffs and Defendants.

That the Plaintiffs have suffered no damage beyond that sum, of which sum, the proportionate amount which, in terms of the policy, could be claimed against the Defendants, was that of £4,323.30c.

That out of that sum is to be deducted the value of goods damaged, which the Plaintiffs have chosen to keep and retain, which value is in the above mentioned proportion of £595.40, leaving, therefore, the sum of $3,727.96 as the amount which the Plaintiffs can claim from the Defendants.

That sum of £3,727.96 the Defendants paid into Court in full satisfaction of the Plaintiff's claim.

The Plaintiffs replied in substance that altho' there was an agreement to refer, yet that the alleged valuation of the appraisers, is null and void in law and fact, that the Plaintiffs never went with the Defendants before the Chamber of Commerce, that neither the Appraisers nor the Chamber of Commerce ever valued all the goods which were in the shop and store, that all the proceedings were *ex parte* as to the Plaintiffs, and without the Plaintiffs' knowledge, presence or sanction.

They joined issue in other pleas which were either formal, or the consequence of the real point before the Court.

A. LEGALL, for the Plaintiffs, opened the case and called a witness to prove the value of the goods, when

J. COLIN, for Defendants, objected, putting in the award of the Chamber of Commerce and the memorandum of the proceedings held by that body, urging that this was final and conclusive between the parties.

LEGALL, in reply, argued. The award is no award: we were not present at the sittings; we were left outside the door of the Hall where the delegates of the Chamber of Commerce sat, and were not heard. The Chamber of Commerce has no right to delegate the reference made to itself and nothing, besides, in the provisional receipt given to us when we paid our money, led us to infer that we should have to see any claims adjudicated upon by arbitrators. No valuation has taken place, and we have a right to come before this Court for redress.

JUDGMENT.

Contracts fairly entered into must be carried into execution according to the spirit which discloses the intent, the letter which expresses the will of the contracting parties. In the Policy on which the Plaintiffs found their case, we read this clause :

Section 23rd. "La reconnaissance et l'estimation du dommage sont faites de gré à gré par deux experts choisis par chacune des parties. En cas de désaccord, la Chambre de Commerce jugera souverainement."

We also read, Art. 18, par. 3d: "Si la mention de cette déclaration (*i. e.* that the goods insured are already to be insured by some other Insurance Company) a eu lieu, la Compagnie en cas d'incendie supporte la perte, en proportion de la somme assurée par elle.

In this case it appears to us that the Plaintiffs were perfectly well aware of the conditions under which they insured their stock in trade; it is all very well to say that the provisional receipt given to them, when they paid down the premium, makes no mention of a Reference; but it is hard to believe that parties insure without ascertaining under what conditions the risk is taken; at any rate, in law the Plaintiffs' objection is untenable on two grounds: 1o. Because the policy which ushers in their action bears the condition in question upon its face; and 2nd'y. Because they did, in reality, comply with that condition. They named their appraiser, Mr. Larcher, as the Company named theirs, Mr. Dusavel;

they received notice of the sitting of the Chamber of Commerce, without protest never, so far as we can see, thinking of repudiating the condition before us, because it does not appear in the provisional receipt, until after the final award was made known, which did not exactly meet their views.

We have no hesitation to overrule this objection. We shall now proceed to consider the award itself, and the points taken to lead us to disregard it.

It should first be stated that, in our opinion, the fact that the value of goods which stock a shop, at the time of a fire, is, of all matters, the subject which can best be elucidated by a reference to practical men, well acquainted with the value of dry and other goods, and who can have every means in their power to assit them to a sound conclusion a very short time after the fire itself has taken place.

It should also not be lost sight of that this is not a motion made by the Defendants to make the award a Rule of Court so as to have execution thereon, or by the Plaintiffs to have it set aside. The Plaintiffs ignore, the award, ignore the condition in the policy and bring into Court an action to recover the full amount of the risk taken, as if there had been no condition of reference at all. The Defendants meet them by saying; we have agreed to refer, we have referred and here is the result.

The consequence is that, should any of the points taken lead us to the conclusion that the accord is bad, we have great doubts whether we could listen to the Plaintiffs in this present action; it would perhaps be, as the Defendants have put it, the duty of the Court to refer the matter back to the arbitrators, perhaps to nonsuit the Plaintiffs; but, at all events, we do not well see how, if the point is pressed, we could on the present action, now give Judgment for the Plaintiffs.

But we do not think the award bad, as it stands.

What would be the force of the word "Souverainement? whether it takes away the right to challenge the award at all, we do not feel ourselves called upon to decide, now. The points taken do not satisfy us that we should interfere at all with this award.

The three points taken by Mr. Legall for the Plaintiffs, are:

1st. That the Chamber of Commerce could not delegate its powers.

2nd. That no valuation took place.

3rd. That the parties were not heard, and all was done exparte.

It is perfectly true that the reference being to the Chamber of Commerce, the Chamber of Commerce could not delegate its powers to any other body or to any individual; but it is not the fact that the Chamber of Commerce has delegated its powers; it sat, as it apparently always does sit, in committee, and assuredly it could not enter the idea of the contracting parties to say that the reference to the Chamber of Commerce was to be a reference to every member of the Chamber of Commerce; the clause means that the reference was to be to the Chamber of Commerce acting and sitting as the Chamber of Commerce usually acts and sits; it is very true that three gentlemen apparently members of that body were chosen by the Committee to value the goods, and report; but the award was not the award of the appraisers, it was the award of the Chamber, an award which was based, and why not? upon the report of three gentlemen well acquainted with the particular trade of the insured, but an award which might not and certainly would not have adopted such valuation, if the Chamber had not been satisfied with its accuracy.

Now have arbitrators the right to appoint appraisers to guide them in matters where they inquire light? They have and should have a discretionary power as to that. The COUR DE CASSATION in *Rens v. Ailbrouch*, so held, declaring that arbitrators who had declined to appoint appraisers, because the facts before them did not appear to them to warrant such procedure, had not violated the law "qui s'en rapportait à eux sur l'appréciation de ces faits. 13 Avril 1809. DALLOZ.—See another decision of the COUR DE CASSATION of the 26th June 1833. DALLOZ. *Perrod* vs. *Viot*.

If the decision laid before us had been solely the Report of the three Gentlemen in question, we should not have considered that decision as an award, but we read these words: 'Extract from the Minutes of the Chamber of Commerce: 27th July 1866." The President thus submitted the Report of the last Committee and begged the Chamber to decide whether that document contained sufficient information to guide them to a decision. The Chamber decided in the affirmative and on the proposal of Mr Lassime, seconded by Mr Maroussem, the Chamber fixed the value of the goods damaged &c, &c.

We confess that we do not see a scintilla of proof that the Chamber of Commerce, to which the will of their parties, their own choice, their own contract, (there could be no compulsion,) referred the matter in dispute, delegated its trust to any one. Now, is it the fact that no valuation took place? There was Mr Larcher's valuation, and Mr Dusavel's valuation; if they agreed, there could be, by the terms of policy, no reference to another party. They did not agree, they made their respective inventories, which, we find, were seen and compared by the Gentlemen appointed to Report; there is more: before Messrs Wilson, Richer and Galdemar were appointed, the two appraisers in question appeared (19th July) before the Chamber, were heard, and their estimation was examined, and it was after hearing them and examining their estimation that the special appraisers were appointed to report.

The Report of the special appraisers was cavilled at, because it speaks of the principal goods.

So it does ; but the gentlemen in question give their reasons for arriving at the conclusions which they came to ; they satisfied the Chamber that appointed them,and they satisfy us. The objection that there was no valuation is certainly very far fetched,and in our judgment, fails.

The third point was that the parties were not heard.

We find that the appraisers were heard ; we find a written notice given to the parties to attend before the Chamber of Commerce on the 19th of July, when the special Committee of appraisers examined the goods ; they did so in the shop of Messrs. Fantoni and Bonorchis : we see no request for a further hearing. If the parties had, in person, requested to be present at the several meetings of the Chamber of Commerce and to be heard when the sole question was that of knowing whether the goods damaged were worth a certain sum of money or another certain sum, and the Chamber of Commerce had rejected the application to hear either the parties or their mandatories, the question might have arisen whether the parties, upon such a reference as this,had a right to be present at and to the meetings. But we have no proof of a special request, or of a refusal, whilst we have proof that notice was given to the parties to attend ; we have proof that the appraisers did attend, were heard, and their Report examined; we have proof to satisfy us that the ends of Justice have been substantially kept in view, and we cannot allow vague statements to shake the force of what we find shown to our satisfaction.

It should be also observed that, in reality, the Chamber of Commerce was not invested by this reference with the duties of an umpire or "tiers arbitre," but rather with the duties of a sole arbitrator, agreed upon by the parties to decide with sovereign powers.

The two other gentlemen who had to act first, are not arbitrators, they are appraisers, they decide nothing ; if they agreed as to the value of goods, the parties were to be satisfied; if they did not agree, their respective awards were not to be submitted to an umpire, but then a sole arbitrator was to come into the field and decide.

On the whole, then, we are satisfied that the parties have bound themselves by a legal contract, that in execution of that contract they appointed appraisers, and then, again, went before a body of gentlemen chosen by themselves to decide on their special differences, and that the decision which their own will has made compulsory upon them, ought not to be disturbed.

The Defendants have paid into Court the sum they were found to be liable in ; the Plaintiffs are entitled to take that sum out of the Registry, subject to the attachments that may keep it there, and subject also to costs and to such dues as accrue to the Treasury.

But we find that the Defendants are, after such payment, fully discharged ; we also find them entitled to their costs.

SUPREME COURT

VENTE D'IMMEUBLE, — CONTENANCE, — INTERPRETATION DU CONTRAT,—APPEL D'UN JUGEMENT DU MASTER.

La vente d'une propriété sucrière, sans indication de contenance, comprend toutes les portions de terre qui composent cette propriété ; et plus spécialement, lorsque cette propriété est désignée par un nom, tous les terrains qui sous ce nom formaient partie de la propriété lorsqu'elle a été achetée par le vendeur, sont compris dans la seconde vente faite par ce dernier.

SALE OF IMMOVEABLE PROPERTY, — EXTENT,— INTERPRETATION OF CONTRACT,—APPEAL FROM A JUDGMENT OF THE MASTER.

The sale of a Sugar Estate without any mention as to its extent, includes all the plots of ground composing the said Estate ; and when the said estate is designated by a name, all the plots of ground which under that name composed the Estate, when the vendor purchased it, are considered as included in the second sale made by the latter.

COURBADON,—Appellant,

versus

DUBOIS,—Respondent,

and

WIDOW ARLANDA,—Appellant,

versus

DUBOIS,—Respondent.

Before :

His Honor the ACTING CHIEF JUDGE, and
His Honor MR. JUSTICE ARNAUD.

L. ROUILLARD { Of Counsel for Courbadon.
{ Do. Do. Widow Arlanda.
F. VICTOR, —Attorney for the same.
E. LECLEZIO, —Of Counsel for Respondent.
E. LECLEZIO SR.—Respondent's Attorney.

20*th March* 1867.

These were two Appeals from a Decision of the Master, of the 4th February 1867, ordering that a certain plot of ground, of 25 acres, claimed by the Respondent be withdrawn from the seizure and memorandum of sale of the Estate

"*Clémencia*," for the reasons set forth in the Decision now complained of.

The interest of the two Appellants being one and the same, the two appeals were consolidated, on the application of parties, on the calling of the cause for trial.

Two points were taken before the Master:—

1o. Whether in the sale to Arlanda, of the Estate "*l'Hermitage*," now known by the name of "*Clemencia*," was included not only what might be called "*l'Hermitage*," proper, but a piece of ground of 25 acres in extent, situate at "Trois Ilots," at some three or four miles from "*l'Hermitage*" proper, and

2o. If so, prescription was set up by the Respondent, as to the piece of land.

The Master held that this piece of ground was not included in the sale of Fabre and Denis Brousse de Gersigny to Arlanda.

It was contended that the Master was wrong in so adjudicating.

In support of this proposition, the Appellants read the deed of sale from Aristide Fabre and Denis Brousse de Gersigny, wherein it is said that these parties "vendent à M. Arlanda, une "habitation établie en sucrerie et connue sous "le nom de "*l'Hermitage*," de la contenance de "..... arpens.

"Sont compris dans la présente vente &a., &a., "et généralement toutes les appartenances et "dépendances de la dite habitation, sans au- "cune autre exception que le moulin à vapeur "&a.

"Messieurs Fabre et Brousse de Gersigny "sont propriétaires de la *dite habitation* pour "s'en être rendus adjudicataires à la Barre "moyennant le prix de £73,000 sur la Folle "Enchère poursurvie contre le sieur Aimé Duval.

"La présente vente est faite aux charges or- "dinaires, et en outre, moyennant pareille "somme de £73,000. (Payable à l'ordre.)

"M. Arlanda déclare se mettre au lieu et "place de MM. Fabre et de Gersigny vis à vis "des créanciers.

"MM. Fabre et de Gersigny s'obligent de "mettre M. Arlanda immédiatement *en posses- "sion* de l'habitation *présentement vendue* et de "ses appartenances et dépendances."

The number of acres sold not being mentioned in the sale from Fabre and Brousse de Gersigny to Arlanda, reference had to be made of necessity to the Cahier des charges upon which the vendors to Arlanda purchased the Estate conveyed by them to the latter.

The subjects set up for sale were:

1o. Several portions of land united in one and the same Estate, known by the name of *l'Hermitage*.

2o. Of another portion of land of 25 acres, situate at "Trois Ilots," being part of and united to the portions of land above mentioned and hereinafter designated.

The said portions (and not portion) belong to, &c.

As the whole is, stands and extends without retention and reservation.

Hence was it argued the Estate *l'Hermitage* made up of the various portions of land described under Nos. 1 and 2, was the subject purchased by Arlanda's vendors.

In the sale to Arlanda the latter declares "se "mettre au lieu et place de MM. Fabre et de "Gersigny, vis-à-vis des créanciers qui seront "colloqués à l'Ordre du prix de l'adjudication "faite aux dits sieurs Fabre et de Gersigny."

The subject sold to Arlanda was "une habi- "tation erigée en sucrerie et connue sous le "nom de "*l'Hermitage*" et toutes les dépen- "dances de la dite habitation, sans aucune autre "exception que le moulin à vapeur &a. "de Cook" the guarantee of Maigrot et Dhotman.

The vendors made but this one single exception as to the mill; are we not then entitled to infer that the subject conveyed to Arlanda was the same subject as that purchased, at the Bar, with the whole of its component parts, including the portion of land of 25 acres?

Unless it be so, how could Arlanda be said to be in lieu and stead of his vendors as to the creditors of "*l'Hermitage*," whose rights extended over the whole Estate as sold at the Bar.

If the vendors had ever intended to sell "*l'Hermitage*" shorn of the piece of land of 25 acres, they should have excluded it in terms as express as used in reference to Cook's mill.

This they have not done; any doubt as to the intention of the vendors must be construed against the latter in favor of the purchaser. Art. 1,162 C. C.

The Judgment of the Master was supported by E. Leclezio Jr., on the same grounds and for the same reasons as set forth by the Master in his Judgment.

JUDGMENT.

The subject sold at the Bar and purchased by Fabre and de Gersigny were several portions of land comprised under Nos. 1 and 2 of the "Cahier des charges", admeasuring together about 775 acres.

The lot No. 2, though three or four miles distant from the mill is, nevertheless, a part and parcel of and united with the other portion No. 1, into one and the same Estate "*l'Hermitage*."

They were not sold in several lots but in one

single lot; and the several lots jointly realized the sum of $73,000.

Such was "*l'Hermitage*" purchased by Fabre and de Gersigny.

Such must have been "*l'Hermitage*" by them sold to and purchased by Arlanda.

1o. Because the sale to Arlanda has these words: "La présente vente," of what? de la dite habitation ("*l'Hermitage*") dont ils (Fabre et de Gersigny) sont propriétaires pour s'en être rendus adjudicataires à la Barre, moyennant $73,000.

2ndly. Because of the stipulation that Arlanda should stand in lieu and stead of Fabre and de Gersigny *quoad* the creditors of the Estate whose rights rested on the portions of land comprised under No. 1 and the 25 acres, portion mentioned under No. 2.

If he were to be liable to the creditors of the Estate, it could only be on the ground of his being in possession of the pledge of the creditors.

Had Fabre and de Gersigny intended to depart from such a necessary inference, express mention should have been made of such intended departure; for it is not rational, nor is it reasonable to suppose that a landed Estate, originally composed of two parts, should fetch the same price for one of its component parts; such a thing may occur, no doubt, but we have no sufficient presumptions and still less evidence of its occurrence in this case.

The distance of three or four miles of No. 2 from No. 1, referred to by the Master, is no greater obstacle to their union than a distance of three or four hundred yards between any two other portions of land of "l'Hermitage"; their material and physical junction would be as impossible in the last as well as in the first case; but not so of their intellectual or moral junction.

All we have to enquire into is: what did Fabre and de Gersigny purchase at the Bar? and what did they sell to Arlanda?

They purchased the pieces of land described under Nos. 1 & 2 which together composed the Estate *l'Hermitage*.

The sale of *l'Hermitage* was the sale of the pieces of land Nos. 1 & 2 without which *l'Hermitage* could not have been said to have been either sold or purchased.

L'Hermitage, minus one of its parts, is not *l'Hermitage*, but a part thereof, only.

L'Hermitage having been sold to Arlanda, we infer that Arlanda acquired all the component parts of *l'Hermitage*, viz: portions Nos. 1 & 2.

Had the vendors intended otherwise, they should have taken care of expressing such their intention in unmistakable language.

The piece of land No. 2 having, in our opinion, been conveyed to Arlanda by the sale to him of *l'Hermitage*, we necessarily infer that Fabre had no right to convey to Gersigny the portion conveyed by the latter to the Respondent.

This conclusion relieves us from the necessity of enquiring into the merits of the other parts of the Master's Report.

We shall, and therefore do, allow the two Appeals, and quashing the Decision of the Master, we order that the piece of land of 25 acres be put for sale along with the other parts of *l'Hermitage* alias *Clémencia* Estate.

Costs against Respondent.

SUPREME COURT.

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PROCUREUR ET AVOCAT GENERAL,—SON SUBSTITUT,—MINISTÈRE PUBLIC,—ART. 86 DU C.P.C.,—ORDRES EN CONSEIL DU 20 JUILLET 1831; 6 NOVEMBRE 1832; 23 OCTOBRE 1851. Art. 12.

Les parties ne pourront charger de leur défense, soit verbale soit par écrit, même à titre de consultation, le Procureur et Avocat Général, ni son Substitut.

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PROCUREUR AND ADVOCATE GENERAL,—HIS SUBSTITUTE,—RIGHT OF PRIVATE PRACTISE,—ART. 86. C.C.P.,—"MINISTÈRE PUBLIC,"—ORDERS IN COUNCIL OF 20TH JULY; 6TH NOVEMBER 1832; 23RD OCTOBER 1851; ART. 12.

The parties to a suit shall not be at liberty to entrust their defense, either oral or by writing, even by way of advice, to the Procureur and Advocate General or his Substitute.

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IN THE MATTER OF:

THE CEYLON COMPANY

versus

CORDOUAN.

—

Before:

His Honor the ACTING CHIEF JUDGE,
The Honorable Mr. JUSTICE COLIN and
The Honorable Mr. JUSTICE ARNAUD.

—

S. J. DOUGLAS, —Acting Procureur and Advocate General, and Senior Counsel for Plaintiffs.

J. L. COLIN, —Acting Substitute for the Procureur and Advocate General, and Junior Counsel for Plaintiffs.

THE HON. V. NAZ,—Of Counsel for Defendant.

—

Judgment delivered by His Honor Mr. Justice L. Arnaud.

—

10*th May* 1867.

On Mr. Douglas rising to make a motion in this case, Mr. Naz objected that the Procureur and Advocate General and his Substitute had not the right to appear as advocates, for a private party, before the Court; he cited Art. 86 of the Code of Civil Procedure.

The Acting Procureur and Advocate General and Mr. Jules Colin, acting as Substitute of the Procureur and Advocate General, both have contended in answer that Art. 86 of the Code of Civil Procedure is virtually if not expressly abrogated: that the Order in Council of the 20th of July 1831 has modified the functions of the Procureur and Advocate General before the Civil Courts of the Colony, so as to imply the abrogation of that Article.

That the Order in Council of the 23rd of October 1851, sanctioning Ordinance 2 of 1850, has modified not only the duties of the Procureur and Advocate General, but also the whole judicial system of the Colony, so as to have done away with the reasons which had called for the enactment of the article in question, on the strength of the maxim *cessante ratione, cessat ipsa lex.* That owing to these modifications the functions of the Procureur and Advocate General are assimilated to those of the Attorney General in England. Both these officers have cited a Judgment of the Supreme Court, on the same point, in a case of *Lang, Freeland & Co.* v. *Reid, Irving & Co.*, and they said that they held their commissions by temporary and provisional arrangement pending the absence of the Procureur and Advocate General, and claimed the benefit of a course established now for a certain number of years during which the Substitute Procureur and Advocate General, whose rights and duties they claim to be indivisible with those of the head of the office, has used the right of taking private practice.

Art. 86 has not been repealed, and the question before the Court, to-day, is: has it or has it not been impliedly abrogated by subsequent legislative enactments which have modified the functions of the Procureur and Advocate General as well as the judicial system of the Colony.

Before ascertaining the extent of such modification, it is necessary to see what was the nature of the functions intrusted to the office now held by the acting Procureur and Advocate General and his Substitute, previous to any modifying enactments, that is before the year 1831.

The Procureur General held a situation very different from that of the Attorney General in England; he was the head of an institution which does not exist in the mother country, that is the "Ministère Public;" its duties were to enforce the execution of the law in all matters, criminal and civil, concerning public order, and to protect the rights of Government, the rights of parties unable to protect themselves, such as minors; and lastly to give conclusions for the assistance of Courts of law.

In order to value the character of that office, we must fully understand the peculiar nature of the system of our laws. One must remember that in a number of cases the Courts are called upon to adjudicate in a definitive manner on the rights of minors, of women, of parties incapacitated who may not have their rights under the protection of trustees, trusteeship being forbidden, and also that the Court is bound to give judicial validity to a number of proceedings peculiar to our system, such as licitations, partitions-"ordres," envois en possession," in which the most effective, too often the only protection afforded to parties unable to defend themselves rests in the intervention of the "Ministère Public," an intervention the most important of the duties of such office, the importance of which is specially relative to our system of laws, but without which the rights of many would be placed in jeopardy, unless the body of our civil law was seriously modified.

The functions of "Ministère Public" were fulfilled in our Colony by the Procureur General, the "Procureur du Roi" and his Substitutes. It is only necessary, for the intelligence of the matter under consideration, to refer to such of these duties which were performed by those officers before the Civil Courts of the Island. In civil cases between parties of age and masters of their own rights, they were expected to give their conclusions, but that was not a legal necessity; whilst in cases where persons incapacitated by law or where public order was concerned, the proceedings were to be communicated, "sous peine de nullité," to the "Ministère Public," and no Judgment was valid until after he had been heard in the matter.

In 1831, an officer was appointed with the title of Advocate General; (a title which in our system belongs to officers whose special office is to perform the duties of the "Ministère Public" before the highest Civil Courts.) That officer, Mr. Cooper, was appointed on the footing of an Attorney General in England, he was made Counsel for the Crown, called to the Council of Government (10th October 1831) but was *specially precluded by his commission from fulfilling the functions of "Ministère Public."*

Subsequently an order in Council of the 13th April 1831 was promulgated, which purports to modify the judicial system of the Island, and contains a proviso respecting the office of the Procureur General; it runs thus: "and it is further ordered that in all civil cases depending from the said "Cour d'Appel" or the said "Tribunal de première instance" the Procureur General of the Island or his Substitutes are and shall be *relieved* from the duty heretofore incumbent on them of making their conclusions for *the assistance of the said tribunals.*

Mr. Acting Procureur and Advocate General construes this provision into an abrogation of the laws that make it discretionary, as well as those that make it imperative upon the "Ministère Public" to give conclusions; according to his

view, the "Ministère Public," from that time, has ceased to be an integral part of the Court, his duties and privileges have been considerably reduced, hence, he says that with the duties have disappeared the liabilities of Art. 86 of the Code of Civil procedure.

I cannot agree with him: it must be observed that the provision contained no abrogation whatever, it simply tenders a relief of certain duties to a public officer; a relief of which that officer might or might not take advantage, so that, if the abrogation of Art 86 is drawn as an inference from such relief, such abrogation would be but conditionnal and dependant upon the discretion of a public officer. And it has so happened, in point of fact, that this relief was not accepted and the provision was not carried into execution; for, we find in the minutes of both the late Court of Appeal and of the Tribunal of First Instance that the Ministère Public have been in attendance and gave their conclusions after the promulgation of the Order in Council, in the same manner as before, and this state of things has lasted until the Order in Council of 1851. Moreover nothing justifies the assumption that in the new organisation the Procureur General ceased to be an integral part of the Court. The very reverse is all along written in the Proclamation which accompanied the publication of the Royal Instructions and of the Order in Council; it provides: Art. 1. "The Court of Appeal of the Island of Mauritius shall be composed as follows:

H. H. Edw. Blackburn, Chief Judge, first President.
J. M. M. Virieux, Esqre, Vice-President.
Edw. Rémono, Assistant Judge.
Prosper d'Epinay, King's Procureur General.

(Proclamation of the 30th August 1821.)

It is clear that from the very tenor of the Order in Council it was never meant to operate as argued by Mr. Douglas; it purports, in terms to relieve the Procureur General, only of the obligation of giving such conclusions that were necessary for the assistance of the Court, but it says not a word of such conclusions which are no more formal, no more for the assistance of the Court, but which are given for the defence of parties unprotected which are essential for the validity of proceedings, which are provided "à peine de nullité" and are provided in a number of separate and distinct articles, the subrogation of which would have to be implied in the same way from the same very weak proviso. This I do not admit. I am supported in my opinion by the subsequent enactment proceeding from the same source.

The next Order in Council, in point of date, is one of the 6th of November 1832. The Court of Appeal had ruled "ex officio" that the functions of Advocate General, were inconsistent with those of Procureur General, and in order to reconcile such inconsistency, a special proviso was inserted in that Order in Council which purports to abrogate the "Ministère Public" in those cases in which the Procureur General would have to fulfil functions incompatible with those of the Advocate General, and reserving at the same time to the Court power in such cases where they should think it necessary to ask for the appointment of an officer to fulfil the functions of "Ministère Public". The necessary inference from this provision clearly contradicts the assumption that the Order in Council of 1831 had done away with the duties of the "Ministère Public."

Such was the state of the law on the subject, when the Order in Council of 1851 was promulgated. Art. 12 abrogates the functions of the "Ministère Public" in certain cases and maintains it in others.

From a comparison with Art. 83 of the Code of Civil Procedure, one may ascertain with a certain degree of accuracy the extent of the modifications introduced by that last provision. The "Ministère Public" retains its functions in any cases where the Crown and Revenue are concerned and in any matter connected with the Civil Status of any person, any divorce, guardianship of any minor or interdicted person, that is, in all those cases in which the intervention of the Procureur General is essentially required consistently with the economy of our laws, and it is dispensed with in those cases in which it was required, according to the words of the Order in Council, for the assistance of the Court.

From the consideration of these several Orders in Council, I am of opinion that they have introduced modifications into the functions of the Procureur General, in as much as they have relieved him of certain duties which appear to have become inconsistent with the amended Constitution of our Courts of Law, but that, at the same time, it has retained its essential characteristics, its principal and primary duties, and that no alteration of art. 86 can be inferred from those modifications.

The next question I have to consider is whether the provisions of the Code of Civil Procedure have been abrogated or modified, in their application, by usage or practice of the Court. In order to ascertain how far usage and practice can weigh in such matter, I must review the facts, which can be ascertained, from the very unsatisfactory state of the archives of our Court.

With regard to the office of the Procureur and Advocate General, I see that in 1831 and when Mr Jérémie brought his commission before the Court, for registration, the Judges of Appeal took *proprio motu* an objection to the legality of that commission which united the functions of Procureur and Advocate General and suspended the registration of such commission, and that when in 1856 the officer fulfilling those functions claimed to practice as an Advocate, an objection was taken by one of the practitioners before the Court and the Court ruled that from the changes in our system which had given this Court the powers of the Queen's Bench, they inferred the abrogation of art. 86; with that opinion, it is my misfortune that I cannot agree, for the reasons I have already given.

I cannot see anything which could be construed

into a modification, by law or by usage, of Art. 86, as far as the Procureur General is concerned.

But the case is different with regard to the Substitute Procureur General. I see in the Records of the Court that in 1828, that is prior to any Order in Council or law touching our judicial system, Mr Félix Fadhuile is appointed to act as second Substitute of the "Procureur Général du Roi, et sans que pour raison de ce service éventuel le dit M. Félix Fadhuile soit empêché de suivre sa profession d'Avocat." I see that at a public sitting, on the motion of the Ministère Public, the Proclamation appointing Mr. Fadhuile and his Commission, both containing the power to practice, are read, and the Commission is ordered to be registered by the Court. I must assume, when the record states that both Proclamation and Commission were read in Court that the Judges then, in ordering such Commission to be registered gave their sanction to what was on the face of those documents.—I am not permitted to assume that they may not have deemed it their duty to raise an objection, when I saw from the same records that when two years afterwards they considered that the Commission of the Procureur General was inconsistent with law, they raised the objection "*ex-officio*" and refused to register it until compelled according to law.

I cannot but see there a modification in practice of the strict letter to the law. What is the reason of such modification? We have no means of ascertaining with any thing like certainty. Whether the Judges then claimed a certain discretion over such questions? whether they yielded to necessity? the latter surmise is quite possible, considering that the appointment takes place at a time when the number of practitioners was very limited and when the duties of the profession were performed by the same parties who acted both as attornies and advocates, a state of things which brought up men who are the pride of our small colony and our Bar, but which has necessarily modified the strict application of personal and legal qualifications. This was the time when Judges have been appointed not only from attorneys practising before the Court, but even from persons who did not belong to either of the two branches of the legal profession.

It must also be remarked that, in those times, the functions of the "Ministère Public," before the Court of First Instance were fulfilled by the Substitute Procureur General, for the more important cases, and by a Police officer for smaller cases called Police cases.

Whatever may have been the reasons of Government and of the Court, there, it is a stubborn fact standing on record, that one of the Substitutes of the Procureur General was temporarily allowed private practice by Government, with the implied concurrence of the Court, and without any objection from any quarter.

From that time and for a long space of time, there is nothing on record touching the question, until 1853. Mr. Williams who was Substitute, in the meanwhile, always claimed the right to practice. (Though he seldom appeared for parties.)—At that period, Mr. Douglas, on being appointed first Substitute of the Procureur and Advocate General, claimed and exercised the right of private practice without any objection. After him two eminent members of our Bar successively fulfilled the same functions with the same privileges, and in point of fact, within the last thirty eight years, four distinct persons have fulfilled the functions of Substitute Procureur General, and have practised, as Advocates, at the same time, without any objection having been raised.

It is not in my power to close my eyes to those facts and to a state of things which has existed within the precincts of this Court and on which parties may have been induced to acquire certain vested rights, and I could not feel justified in coming to the conclusion that Government and the Judges, in 1828 and afterwards, and that the gentlemen who had used the privilege of private practice have simply violated the law.

This opinion implies the conclusion that a written law can be modified by a contrary usage, and I am aware that the more recent commentators on the Code Civil have expressed an adverse opinion on the subject, but it is to be observed that they base their opinion principally upon the actual constitution of a country which, to us, is a foreign country, whilst other writers like MERLIN (verbo appel), DURANTON (Vol. 1, No. 109) and TROPLONG, hold a different view of the question, and I am of opinion, in this matter, that where it stands proved to me that within a period exceeding the length of time required in our law for the prescription *longi temporis*, (on several occasions the officer fulfilling the functions of Substitute Procureur General has been allowed temporarily to practice as an Advocate) that such a state of things originating from the Executive with the implied sanction of the Court and without any recorded objection, presents the character of a state of things accepted by universal consent and for a time sufficient to make it a usage, which has modified, to the extent of such usage, the letter of Art. 86.

It has been said at the Bar that such rights, if admitted to have been acquired by the Substitute of the Procureur General, must inner to the benefit of the latter, by reason of the indivisibility of their functions.

Such argument cannot be entertained for one moment.

The doctrine of indivisibility of the "Ministère Public" is written no where in our laws; it is founded in France, partly on custom and expediency, and partly inferred from Art. 7 & 47 of the Law of the 20th April 1810, creating the judicial organization of that country, and which has never been promulgated here. But even there the principle of indivisibility has been upheld to this extent, that one member of the "Ministère Public" having taken a step in any case, could be replaced in the course of the case by any other member of the "Ministère Public," but I have seen it nowhere contended that besides the common functions exercised by members of that body they could not possess distinct rights and have

to perform different duties. The contrary appears in the very law from which, in France, the principle of indivisibility is drawn; from it I see that before the inferior Courts the functions of the "Ministère Public" are fulfilled by the Mayor and Deputy-Mayor of the locality in which the Court is situated, that is by persons having very different duties to perform. I am therefore clearly of opinion that the Procureur General and his Substitutes may legally have rights and duties different over and above the functions which they may have to fulfil in common as members of the "Ministère Public."

On the whole, the question being whether the acting Procureur and Advocate General and his Substitute can consistently with the law of the land, as it at present stands, take advantage of the temporary arrangement by which they claim the right to practice for private parties, I am of opinion that the acting Procureur General has not such right, but that with regard to his Substitute I do not feel justified in interfering with any such arrangement.

THE HON. G. COLIN then delivered his Judgment. He apologized for not having written it, but explained that he had been prevented from doing so on account of a recent illness. He developped the reasons for his opinion which were that Art. 86 of the Code of Civil Procedure must be followed in its entirety. There was a distinction to be made between practice and custom. The practice of the Court was, in fact, the law of the Court; but that rule only applies to questions of procedure and matters in which there was no written law. Even admitting that usage could abolish a written law, it cannot be said that there has been, in Mauritius, a regulated and established custom authorizing the Substitute Procureur General to appear for private parties.

If the HON. MR. DOUGLAS did so, his predecessors abstained from doing so. At all events, the law of the Colony, in his opinion, could abolish a written enactment. For these reasons, he could not adopt the restriction of his brother ARNAUD; he, therefore, considered both the Procureur General and his Substitute were debarred from private practice. He never felt himself in a more painful position. He would have been glad to have avoided taking any share in the Judgment; but being specially called upon, he was bound to interpret according to his conscience and his conviction, the meaning of a distinction and unrepealed provision of the Code.

Judgment delivered by His Honor Mr. Justice N. G. Bestel.

On The HONORABLE THE ACTING PROCUREUR AND ADVOCATE GENERAL moving, in the case of *the Ceylon Company Limited* v. *Cordouan*, for a Rule calling upon the latter to shew cause;

THE HONORABLE V. NAZ disputed the right of the Acting PROCUREUR GENERAL and SUBSTITUTE to appear before the Court, but for the CROWN; HON. V. NAZ contended that the official character of the PROCUREUR GENERAL and SUBSTITUTE precluded them from private practice, which was inconsistent:

1o. With the dignity of their Office.

2o. With the letter and spirit of Arts. 83 and 86 "Code Procédure Civile" still in force.

Those two propositions were very ably and fully developped by the HONORABLE NAZ; and were met by the following answers from the Officers of the "Ministère Public."

1o. The changes undergone by the Institution of the "Ministère Public," from the Orders in Council of 1831 and 1851, have done away with the reasons which originally prevented the members of the Parquet from taking the defence of private parties.

2o. THE PROCUREUR GENERAL, now, forms no component part of the Supreme Court and is now divested of that Magistrature which was one if not the sole reason for their exclusion from private practice.

3o. *Res judicata* on this point. In the case of *Reid Irving and Company* v *Lang, Freeland and Company*, argued before the three Judges then on the Bench, the right to private practice on the part of Mr. DOUGLAS, then as now, ACTING PROCUREUR AND ADVOCATE GENERAL, was disputed by Hewetson whose objection was, however, overruled by the three Judges unanimously, on the 1st February 1856.

4o. Since that time Mr. Douglas was gone on Acting as Counsel for private parties, with the concurrence of the Bar, and to the knowledge of the Court.

The point upon which I am called to express my opinion has already incidentally come under the consideration of the Supreme Court, on the 1st February 1856, on the trial of the case of *Reid Irving & Co.* v *Lang Freeland & Co.*

In that case, Hewetson, the attorney of *Lang Freeland & Co.*, said:

Mr. Douglas, Procureur General, has no *persona standi* to argue against me, as being PROCUREUR GENERAL. He quoted Art. 86, C. P. C. and maintained that the practice of the Court cannot change the laws.

The various arguments urged by the HON. V. NAZ in support of his objection against the right of the Acting PROCUREUR AND ADVOCATE GENERAL and SUBSTITUTE, were summarily urged, at the time, by Hewetson.

Reference was then as latterly made to the provisions of the Art. 83 of the CIVIL CODE OF PROCEDURE, to the Orders in Council of 1831 & 1852.

The inferences drawn from these several legal enactments were stated to the three Judges then on the Bench, who, after hearing the then and now ADVOCATE P. G. unanimously overruled the objection, whereupon DOUGLAS was heard.

Were the Judges' right in so adjudicating on the objections taken? If not how far can their unanimous ruling be binding on the Supreme Court of the present day.

To ascertain the first of these two propositions let us refer to an earlier period; I find an Order in Council of the 13th April 1831, ordering *inter alia* "that in civil cases depending before the "said "Cour d'Appel" or the said "Tribunal "de Première Instance." the Procureur General of the Island or his *Substitutes* are *and shall "be relieved* from the duty heretofore incumbent "on them of making their conclusions for the "assistance of the said Tribunals."

I, subsequently, find in 1832, a Proclamation of His Excellency the then Governor, appointing Mr. John Jérémie, Procureur and Advocate General, which Proclamation gave rise to the following Judgment of the then Supreme Court.

On the 14th July 1832, at an extraordinary sitting of the Supreme Court composed as follows:

Son Honneur Ed. B. Blackburn, Chef Juge et Premier Président; M. Virieux, Vice-Président; et Me Bestel, avocat, appelé pour compléter la Cour, comme le plus ancien avocat sur le tableau, non empêché; Me Adrien d'Epinay, Avoué, appelé au Banc du Ministère Public:

Le Ministère Public a requis la lecture par le Greffier, d'une Proclamation de Son Excellence le Gouverneur, sous la date du 8 Juin dernier, portant nomination de Monsieur John Jéremie aux offices de Procureur Général et d'Avocat Général.

Après lecture de la dite Proclamation, le Ministère Public a requis qu'il plaise à la Cour, vu &a....

Et considérant que les lettres qui nomment Monsieur John Jérémie Procureur près les Tribunaux de la Colonie, lui donnent en même temps le titre et le révetent des fonctions d'Avocat Général,

Qu'il y a incompatibilité, aux termes des lois de la Colonie, entre ces deux fonctions, ce qui donne lieu à l'application de l'Art. 10 de l'Ordonnance du Roi, du 30 Septembre 1766.

Dire qu'il sera sursis à l'enrégistrement des lettres qui nomment M. J. Jérémie aux fonctions cumulées d'Avocat Général et de Procureur Général.

Ouï le Ministère Public et après en avoir délibéré:

Vu l'article 83 du C. P. C.

Vu l'article 480 du même Code No. 8,

Vu l'article 86 du même Code,

Vu l'article 10 de l'Ordre du Roi, du 30 Septembre 1766,

Vu la Proclamation de Son Excellence le Gouverneur, en date du 8 Juin dernier, par laquelle John Jérémie est nommé Procureur Général et Avocat Général de Sa Majesté, en cette Colonie et dépendances,

Attendu qu'il n'a pas été dérogé aux susdits Articles du Code de Procédure Civile,

Attendu dès lors, qu'il résulte incompatibilité entre les fonctions du Procureur Général et celle d'Avocat-Général, qu'il est du devoir impérieux de la Cour de signaler respectueusement à l'Autorité Supérieure.

Attendu que le moyen légal d'y parvenir est indiqué part l'Art. 10 de l'Ordonnance Royale déjà citée,

Par ces motifs, la Cour surseoit à l'enregistrement de la Proclamation dont s'agit en ce qu'elle cumule les fonctions de Procureur-Général et d'Avocat-Général.

Ordonne qu'Expédition du présent Arrêt sera transmis à Son Excellence le Gouverneur, pour son approbation.

On the 16th July 1832, follows another Judgment of the Court, composed of the same members as above:

Vu la minute de Son Excellence le Gouverneur, en date de ce jour, par laquelle après avoir pris communication de l'Arrêt de la Cour rendu le 14 du courant, à elle transmis pour son approbation, elle déclare n'être pas d'avis qu'il soit sursis à l'enregistrement de la Proclamation du 8 Juin dernier,

Attendu que le dit Arrêt de la Cour, du 14 de ce mois, ne pouvait aux termes de l'Article 10 de l'Ordonnance du Roi, du 30 Septembre 1766, en ce qui concerne la surséance qu'il prononce, recevoir son complément qu'autant que cette mesure aurait obtenu l'approbation de Son Excellence;

Attendu qu'aux termes de la Minute dont s'agit, l'approbation nécessaire n'a pas été accordée;

Par ces motifs la Cour ordonne l'enregistrement de la Proclamation du 8 Juin dernier.

Ordonne la Cour que par un arrêté particulier, il sera, aux termes de l'art. 9 de la dite Ordonnance, fait à sa Majesté de respectueuses remontrances sur l'incompatibilité des fonctions cumulées de Procureur-Général et d'Avocat Général confiées à Monsieur Jérémie.

In compliance with the last paragraph of the above Judgment, and on the same day, 16th July 1832, it was thus ordered by the Court:

La Cour arrête qu'il sera, par M. Virieux nommé commissaire à cet effet, préparé de respectueuses remontrances a sa Majesté, sur l'in-

compatibilité des fonctions de Procureur-Général et d'Avocat-Général cumulées sur la même personne ; en être par lui fait rapport à la Cour dans huitaine, pour ce fait être statué ainsi qu'il appartiendra.

These remonstrances were not drafted nor submitted to the Court for reasons which it is needless now to mention,

But the existence of the Order in Council of the 6th November 1831, read and registered in Court, on the 22nd March 1833, clearly shews that Her Majesty's Home Government had been made acquainted with the Judgment declaring the incompatibility of the joint functions of Procureur-General and Advocate-General in the person of one and the same officer.

After reciting the Clause of the Order in Council relieving the Procureur-Général and his Substitute from giving their conclusions, the Order in Council of the 6th November 1832, continues in these terms : " Attendu que des doutes se sont manifestés, malgré les dispositions prescrites par l'Ordre en Conseil, quant à ce que le Procureur-Général de sa Majesté pouvait légalement réunir à cette charge celle d'Avocat Général de Sa Majesté, pour la dite Ile ;

Attendu que les fonctions du Ministère Public dont le Procureur-Général est le Chef, sont incompatibles, suivant l'allégation, avec celles d'Avocat-Général ;

Maintenant, pour dissiper ces mêmes doutes, il est par le présent ordonné et déclaré que dans tous les cas où le Procureur-Général, par ses fonctions, suivant les lois en vigueur, aurait à remplir des fonctions incompatibles avec celles qu'il aurait comme Avocat-Général, alors, dans ce cas, le Procureur-Général sera, et il est par le présent relevé de l'obligation de conclure ; et en tant qu'il s'agit des dites fonctions, l'office et les devoirs du Ministère Public sont, par le présent abolis, et toutes lois en vigueur ou supposées être en vigueur qui exigent l'intervention du Ministère Public dans tels cas, sous peine de nullité, sont par ce présent, abrogées.. .....Pourvu, néanmoins, que, si dans aucun cas il paraissait aux Juges des dits tribunaux que l'intervention du Ministère-Public, en toute cause, matière ou chose pendante devant eux, est essentielle à l'exécution de la loi et à l'administration de la Justice,et que compatiblement avec la due exécution de sa charge comme Avocat-Général, le Procureur-Général en exercice ne peut en tel cas, remplir ses fonctions comme chef du Ministère Public, il sera loisible au Gouverneur..... et il est, par ce présent, autorisé à nommer, sur la représentation des dits Juges, une personne capable pour agir, dans les dits cas, comme Procureur Général, lesquel remplira, dans ces occasions spéciales, les fonctions attribuées au dit Procureur Général comme .Officier principal du Ministère Public.

The object of this Order in Council was evidently to remedy the evil which might arise from the apprehended conflict pointed out by the Court, between the duties of Procureur and Advocate-General, entrusted to one and the same officer.

To this end, the Order in Council first relieved the Procureur General and his Substitutes from giving his or their conclusions, and repealed the law which made it imperative upon him and them to give such conclusions, reserving, secondly, at the same time, to the Judges, in the cases pointed out by the Order in Council, the power of calling upon the Executive for the appointment of a Procureur General, in such exceptional cases of conflict.

But except in the cases of incompatibility in the duties of Procureur General and Advocate General, the general law of the land continued what and such as it was before the relief afforded the Procureur General from giving his conclusions ; unless that relief be so construed as necessarily drawing after it the abolition of the other duties of the "Ministère Public" as specified in Art. 83 and 86 of the C. P. C. and Article 12 of the Order in Council of 22nd October 1851.

Such is, in fact, the construction contended for by the HONORABLE ADVOCATE PROCUREUR GENERAL and SUBSTITUTE, on the relief afforded the Ministère Public, by the Order in Council of 1831 and 1852 ; the Order in Council of 1831 relieving the Ministère Public from the necessity of giving his conclusions for the information of the Court ;

The Order in Council of 1852, the present Charter of Justice, Art. 12, repeals the same enactments in a somewhat different language :

" The office and functions of the Ministère Public are abolished as far as the attendance of the Procureur General or his Substitute at the sitting of the Supreme Court is, by the existing law, required, on pain of nullity.

But is the Ministère Public, for ever, in all cases, relieved from such attendance ? No ! for, adds, the second part of the same Article : " Except in any causes where the CROWN or the Public Revenue is concerned, and in any matter connected with the Civil Status of any person, any divorce, guardianship of any minor or interdicted person or in which the Procureur General may, under the existing law, intervene as a party."

Let us, now, look at the Articles of the CODE OF CIVIL PROCEDURE.—Art. 83. Seront communiquées au Procureur du Roi, les causes suivantes :

Art. 83, C. C. P.	Order in Council of 1852
1o. Celles qui concernent l'ordre public, l'Etat, le domaine.	Art. 12. Except in any causes where the CROWN or the Public Revenue is concerned,
2o. Celles qui concernent l'état des personnes et les tutelles.	And in any matter connected with the Civil Status of any person, any divorce, guardianship of any minor or interdicted person,
3o. Les causes des femmes non autorisées par leurs maris, lorsqu'il s'agit de leur dot,	

et qu'elles sont mariées, sous le régime dotal ; les causes des mineurs et généralement toutes celles où l'une des parties est défendue par un Curateur.

7o. Les causes concernant ou intéressant les personnes présumées absentes.

Le Procureur du Roi pourra, néanmoins, prendre communication de toutes les autres causes dans lesquelles il croira son ministère nécessaire ; le Tribunal pourra même l'ordonner d'office.

or in which the ProcureurGeneral may,under the existing law, intervene, the Procureur General shall continue to be vested with a superintendance over all ministerial officer (such as Attornies, Ushers, &c) and in like manner over Barristers and Advocates. (See Ord. 9 of 1855.)

The two texts of law so placed in juxta position to each other, shew this important fact, the abolition of the office and functions of the "Ministère Public," in so far as the attendance of the Procureur General or his Substitute at the sitting of the Supreme Court, is, by the existing law, required on pain of nullity, has not relieved the " Ministère Public" from the duties imposed on him by Art. 83 of the C. C. P. and by Art. 12 of the Order in Council of 1852, in the numerous cases referred to by the Order in Council, nor abolished the prohibitions of Art, 86.

It is evident that the Procureur General or Substitute could not, consistently with the legal discharge of the duties of their office, take up a private brief in the cases in which their official presence in Court is required by Art. 12 of the Order in Council of 1852, nor would it be safe for them to do so, as cases might arise in Court disclosing a state of matters or things which might render imperative the intervention of the "Ministère Public."

Further, what has the abolition of the law, in so far only as the conclusions of the " Ministère Public " or his Substitutes, on pain of nullity, is concerned, to do with the right of private practice claimed by the Acting Procureur General and Substitute, whether under the Orders in Council of 1831, or 1852, jointly or severally.

That relief is afforded to the public officer holding the two-fold appointment of Procureur and Advocate General or his Substitute, as a remedy to an apprehended conflict between the duties to be performed by one and the same officer. What right has that public officer to extend to his private purposes and ends an enactment made for the public officer only ? Such an extension cannot but render less efficacious the remedy devised by the legislature for the non interruption of the Administration of Justice.

But it was said that the right of private practice has been conceded by the Bar and sanctioned by the Court, that it has been exercised by the late Honorable Procureur and Advocate General Prosper D'Epinay, by Mr. Williams, Substitute Procureur General, by the present Acting Procureur General, from the date of his coming into office until this day ; that an attempt, by Hewetson, to dispute his right to act as Counsel in a private cause was foiled by the unanimous ruling of three Judges then on the Bench.

The unanimous ruling of the Judges, on the objection, cannot be denied.

But be it observed that the objection of Hewetson was taken incidentally at the opening of a heavy case, which threatened to occupy the attention of the Court for several days, that the unanimous opinion of the Court was expressed, on the spur of the moment, from the Bench and without any previous deliberation at chambers ; these facts cannot but lessen the weight to be attached to the Judgment referred to either as *Res judicata* or as a precedent ; moreover an important authority was not then, no more than latterly, quoted at the Bar.

That authority is no less than the Order in Council of the 6th November 1832, which is the complement of the Order in Council of 1831, and provides the twofold remedy against the probable clashing of the duties of the Procureur and Advocate General, *viz* : 1*o*. the relieving the Procureur and Substitute from the necessity of giving their conclusions and 2*o*. the appointment of a Procureur General *adhoc*.

These applications to the Executive for such an appointment *adhoc*, by their frequency, were the Procureur General allowed private practice, could not fail proving highly prejudicial to a satisfactory and speedy administration of justice. This inconvenience was cured by the enactment of the 2nd part of Art. 12 of the present Charter of Justice, which is no other than a return to the enactments of C. C. P. or in other words the reenactment of those alleged repeated enactments of the CODE OF CIVIL PROCEDURE, thereby restoring to the institution of the "Ministère Public" its former splendour, importance and utility, minus the necessity of giving conclusions, an evil considerably diminished, however, by the right of intervention allowed to the "Ministère Public" by and under the existing Colonial law and in the terms of the Charter of Justice.

Such appears to us the true state of the law : —If so, what becomes of the Soundness of the ruling of the Court, on Hewetson's objection ?

If unsound, can that ruling be binding upon the Supreme Court of the present day ? Yes, say the Procureur General and his Substitute, on the strength of the rule of law *Cursus Curiæ est lex Curiæ*.

But this rule applies to matters of Procedure and of practice only. " Hence if any necessary proceeding in an " action be informal or be not " done in the time limited by the practice of the " Court, it may often, be set aside for irregula- " rity, for, *via tritor via tuta*, and the Courts of " law will not sanction a speculative novelty " without the warrant of any principle,precedent " or authority. (BROOM'S *legal maxims*, 127.)

What has been said of the Procureur and Advocate General applies with equal force and reason to his substitute or substitutes.

The Judgment of the Court is that by the law of the Colony, such as it stands, neither the Procureur and Advocate General nor his substitute or substitutes are allowed or entitled to private practice.

SUPREME COURT.

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ACTION EN DÉGUERPISSEMENT,—BAIL, — CONCESSION.

Lorsqu'un terrain déjà concédé par le Gouvernement a été loué, depuis, par ce dernier à une autre personne, c'est contre le locataire et non contre le Gouvernement que le propriétaire du terrain doit intenter son action en déguerpissement.

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ACTION IN EJECTMENT, — LEASE,—GRANT OF LAND OR "CONCESSION."

Where a plot of ground, already granted by Government, was leased, afterwards, by the latter to another person, the Court ruled that the owner thereof who wishes to recover possession of his property must enter his action in ejectment, not against Government but against the lessee.

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HEIRS RONDEAUX,—Plaintiffs,

versus

COLONIAL GOVERNMENT,—Defendant.

—

Before :

His Honor the ACTING CHIEF JUDGE and His Honor Mr. JUSTICE ARNAUD.

—

W. NEWTON, G. GUIBERT, } Of Counsel for Plaintiffs.
H. BERTIN, —Plaintiffs' Attorney.
S. J. DOUGLAS,—Of Counsel for Defendant.
J. BOUCHET, —Defendant's Attorney.

—

16*th April* 1867.

The Declaration, in this case, alleges a grant by the Colonial Government to Jean Baptiste Rondeaux, of the 1st June 1826, of a plot of ground situate at *Trou Fanfaron*, under certain conditions which have been duly complied with, and states :

That Rondeaux had taken possession of the land granted ;

That after the death of the said Rondeaux, the Plaintiffs, his heirs and representatives continued to enjoy the land and Marine Establishment created thereon ;

That on the 6th July 1850, the Colonial Government leased to one William Prout the said land ;

That on the death of the said Prout, the said land was again leased on 1st February 1863 to the Anonymous Society *The New Patent Slip Company*, which lease was by this company assigned to the *Patent Slip Company*, another anonymous company, of this town of Port Louis.

That on the refusal of the *Patent Slip Company* to deliver possession of the said land to Plaintiffs, the Colonial Government although often requested to restore to Plaintiffs the quiet enjoyment and peaceful possession of the land conceded as above, had always refused and neglected so to do, whereby the Plaintiffs had sustained great loss and damages to the amount of $7,000.

The Defendant demurred and pleaded to the Declaration, at the same time.

For the present, we have to deal only with the Demurrer, because of the insufficiency, in law, of the Declaration as not disclosing any ground of action.

THE HON. ACT. PROCUREUR AND ADV. GENERAL, S. J. DOUGLAS, for the Colonial Government, argued that Rondeaux, to whom the grant was made, had entered into possession, and his heirs might have continued their possession without let or hinderance on the part of Government.

That the loss of possession complained of was altogether due to their own laches.

That they had no right, therefore, to impute their loss of possession to any act of the Colonial Government.

That they were at liberty to eject any one who might have unlawfully deprived them of their possession.

That such was their remedy in law and not the remedy they have chosen, of calling upon the Government to restore to them the quiet possession and enjoyment of the land of which they have been deprived.

Not entitled to such a remedy, still less were they entitled to the damages claimed ;

1o. Because the Queen (or Colonial Government) could not be answerable for damages for any wrong sustained by a subject.

2ndly, Because allowing such damages to have been sustained through the act of one of the agents of the Crown, damages could not be recovered against the Crown for the wrong of one of its officers, on the constitutional principle that the Queen can do no wrong, nor order the doing of any wrong.

If any damages have been sustained by a subject from a wrong of one of the agents of the Crown, the action for such wrong is to be directed against the officer or agent, but on no account against the Crown. *Tobin* vs. *Queen*, Law Journal Report, year 1864. C. P. p. 199-215.—*Feather* vs. *Queen*, Law Journal Report, 1866.

This last proposition met with no great opposition on the part of Messrs NEWTON and G. GUIBERT. Counsel for Plaintiffs, who insisted, however, strongly on the utter uselessness in this case, of the remedy suggested by the Crown

Counsel, viz. : an ejectment of the parties in possession.

These parties having been legally called upon to leave the premises occupied by them, have made known to the Plaintiffs that they were in possession under a lease from the Crown. An action in ejectment would be a round-about way to reach the end contemplated by Plaintiffs, and entailing needless costs against the losing party.

The party in possession having complied with the provisions of Art. 1727 C. C. by bringing to the notice of Plaintiffs the name of his lessor, the Plaintiffs had nothing else to do but at once to call upon the lessor, the Colonial Government, to restore to Plaintiffs the quiet possession and enjoyment of the land so unlawfully leased, to their great loss and damages.

G. GUIBERT, joining W. NEWTON in his argument, quoted the following passage from TROPLONG's Louage, 1, No. 226,—Comment on Art. 1727 C. C. :

No. 226. " Lorsque le preneur est troublé par " une action concernant la propriété du fonds, il " a à choisir entre deux partis : le premier, " c'est d'une part de dénoncer le trouble, et " d'autre part de requérir contre le demandeur " sa mise hors d'instance, en nommant celui pour " qui il possède."

But when is the lessee to do this ? It is only on action brought, said the Crown Counsel; (Art. 1727 C. C.) and in this case no action has been brought against the lessee who has been served with a mere summons to give up possession.

The Plaintiffs' action has been wrongly brought and must be dismissed, with costs, or to say the least, the Plaintiffs must be nonsuited.

JUDGMENT.

The Plaintiffs having in some measure renounced all pretentions to damages, upon the strength of the authorities quoted by the Crown Counsel, in support of his first ground demurred, will relieve us from the necessity of considering a point not unattended with difficulty, viz : that proceedings in the nature of a petition of right to recover unliquidated damages against the Crown, for trespass or wrong of its officers and agents, are not maintainable in law, and we shall at once proceed to consider the next point on which the Plaintiffs chiefly rested their case, *viz* : how far the action directed against the Government to restore the Plaintiffs the quiet possession and enjoyment of the land conceded to them is maintainable.

The grant to Rondeaux was not denied, and that the Plaintiffs had taken possession of the land granted was admitted.

How the Plaintiffs came to have lost their possession is ascribed by the Plaintiffs to a lease originally made to Prout by Government.

The evidence in support of this allegation is to be found in the answer of the *Patent Slip Company* to the summons served upon the possessors of land, *viz* : that they were in possession under a lease from the Crown.

Assuming this to be the case, the remedy traced out by Art. 1,727 C. C. is not an action against the lessor, that he should restore possession, but an action in ejectment against the lessee to give up possession of the land unduly occupied by him.

On action brought, the latter may, if he thinks fit call his lessor to defend the action and require of the Court to be put out of the cause. TROPLONG, Louage, vol. 1, § 267, 268, 269.

We shall not stay to enquire how far the procedure traced out by law is good or bad ; how far it is advisable, on the lessee having informed the Plaintiffs of the existence of his lease, and named his lessor, that an action be brought against the lessee, who, once before the Court might, of right, claim to be put out of the cause.

Suffice it to say that though being entitled to claim his being put out of the cause, yet the interest of the lessee might lead the latter to elect continuing in the cause.

It is therefore material that an action in ejectment be directed against the lessee, were it only to give him an opportunity of using his right of election as to remaining or not a party to the suit between the lessor and ejector.

No action having been brought against the lessee in this case, the necessary inference is that the action against the Government must be dismissed, unless the Plaintiffs elect to be non-suited.

SUPREME COURT.

SOLIDARITÉ,—" NEGOTIORUM GESTOR,"—C. C. ART. 1,214.

Le " Negotiorum gestor " qui a payé une dette solidaire a droit a se faire rembourser pour le tout, en s'adressant à un seul des co-debiteurs.

JOINT AND SEVERAL DEBT,—" NEGOTIORUM GESTOR,"—C. C. ART. 1,214.

The " Negotiorum gestor " who discharges a joint and several debt, is entitled to claim the whole amount thereof from either of the co-debtors.

BOULANGER,—Plaintiff,

versus

MARTIN,—Defendant.

Before :

His Honor the ACTING CHIEF JUDGE and The Honorable MR. JUSTICE ARNAUD.

E. J. LECLEZIO, —Of Counsel for Plaintiff.
G. RITTER, —Plaintiff's Attorney.
G. GUIBERT, —Of Counsel for Defendant.
J. ACKROYD, —Defendant's Attorney.

—

16*th April* 1867.

In this case the Plaintiff brought his action to obtain reimbursement of the sum of $1,611.28, which he alleges to have paid in discharge of a debt due by the Defendant; he brings into Court a writ delivered on Judgment of this Court, whereby execution was issued against the Defendant Martin and against one Robert, jointly and severally. This writ is endorsed by a writing of the creditor in whose favor it had been issued, declaring that he had been paid of his claim by the present Plaintiff, A. Boulanger.

The Defendant stated he had defence in point of fact and in point of law.

In point of fact, he stated: that Boulanger had paid a debt which was not personal to himself, Martin, but which was a debt of a certain firm called the "Guildiverie Centrale;" he examined the Plaintiff on his personal answers, brought witnesses, read the books of the Plaintiff, and documents showing that Boulanger had, on certain occasions, paid debts of the "Guildiverie Centrale;" and also the balance sheet of Boulanger.

The other co-debtor, Mr. Robert, was also called, who, on being examined, declared that, so far as he was concerned, the transactions for which Judgment had been signed against him, was a personal transaction. The evidence shows that after Judgment, this same Robert was arrested in execution and that, at his request, Boulanger paid the debt which was due jointly and severally by himself and by Martin.

On the whole, our opinion on the evidence which has been adduced by the Defendant in this case, is not only that his defence has not been proved, but that he has made out against himself a very strong case of bad faith, of which the least evil has been to raise unduly the costs of this action.

Such being our opinion on the facts stated by the Defendant, we come to that part in which he founds his defence in law.

He said that, 1stly, this was not a question of "*negotiorum gestor*;" that Martin may have been condemned in any other capacity than as a co-debtor; that from the document in Court, the Judgment not explaining the nature and origin of the debt, one might legitimately infer that Martin was only security.

2ndly, that whatever the liability of Martin towards his creditor, with regard to Boulanger, he could only be indebted in one half of the debt.

Of these two points the first rests on an assumption of facts which are not before the Court. Whether Martin was condemned as security or not may have been a good defence if such had been the fact, but in the absence of any attempt to prove it, we must stand by the Judgment which has been given against Robert and the Defendant and against both of them jointly and severally; beyond the terms of such judgment, as it stands on the face of the writ, it is clear that we cannot travel.

The sole question for consideration, therefore, is, whether, having paid a debt due jointly and severally by Robert and Martin, Boulanger can claim the whole against one of these two parties.

It has been contended that in as much as by law, if one of the co-debtors, jointly and severally pays the whole, he has action against the co-debtor for his proportionate share; that it must be the same for the case of a *negotiorum gestor*.

But the assimilation is clearly not correct; the co-debtor who pays a joint and several debt, pays his own debt, for a portion at least, and the law (art. 1,214) determines the proportion in which he may sue his co-debtor. But the *negotiorum gestor* pays, not his own debt, but a debt which all the co-debtors are bound to pay *in toto* the moment they are jointly and severally bound; it is just that he should claim the whole debt against any one of the co-debtor.

Such is the opinion of Commentators, (DALLOZ, *Oblig*: No. 5,476) and we agree with this view of the matter.

We, therefore, give Judgment for the Plaintiff, with costs.

SUPREME COURT.

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FOLLE ENCHERE,—SÉQUESTRE,—REDDITION DE COMPTES.

Le Fol Enchérisseur a le droit de discuter le compte du gardien séquestre nommé à la propriété pendant la vente.

—

FOLLE ENCHÈRE, — SQUESTRATOR, — SETTLEMENT OF ACCOUNT.

A "Fol Enchérisseur" is entitled to claim the vouchers in support of the account of the sequestrator appointed to the Estate during the sale thereof by way of "Folle Enchère."

—

BRÉARD & UX,—Plaintiffs.

versus:

THE CEYLON COMPANY LIMITED,
— Defendants.

Before:

His Honor Mr. JUSTICE COLIN and
His Honor Mr. JUSTICE ARNAUD.

—

E. DUPONT,—Of Counsel for Plaintiffs.
M. SAUZIER, —Attorney for do.
A. LEGALL,—Of Counsel for Defendants.
W. HEWETSON, —Attorney for do.

21*st June* 1867.

The Plaintiff was at one time owner of the Estate "*Savannah,*" which having been seized, was placed under sequestration, from the 6th of February 1863 to the 20th of October 1864.

The Estate was sold on the 24th of October 1864, at the bar and on the "Folle Enchère" of the Plaintiff; at the date of such sale, the Defendant has brought into Court the account of his management as Sequestrator of the said Estate.

Today the Plaintiff calls upon *The Ceylon Company* to deposit the vouchers in support of such account which she alleged to be erroneous.

The Ceylon Company argues that the Plaintiff has no right of action in as much as the Estate having been sold by "Folle Enchère," she stands in law as never having been the owner of such Estate and cannot maintain an action as such previous owner of the Estate "*Savannah.*"

We are of opinion that the Plaintiff is entitled to claim the vouchers in support of the account of sequestration which has been rendered, and has a right to dispute such an account. This is no question as to any right of property over the Estate "*Savannah,*" The Plaintiff contends that the Defendant has received, as Agent for herself in his capacity of "sequestrator" of an Estate which then did belong to her and her creditors, certain monies to be charged in deduction of the amount of goods received by him, and has given account of such agency; that she disputes the balance of such an account and asks for vouchers.

It is hard to conceive the pretention of a party who admits having performed the duties of an Agent and at the same time refuses to give an account or, that which is the same thing, refuses to support his account on the strength of a legal fiction.

We consider that in carrying beyond its legitimate limits the fiction by which a purchaser by "Folle Enchère" is presumed not to have been purchaser, such fiction applies to any title on the Estate and following the Estate itself.

In this case the Plaintiff was owner, at the time, for herself and her creditors, of the goods which had been placed in the possession of the Defendant, and whether these goods came or came not from the Estate and whatever be the situation of the Plaintiff with regard to the Estate itself, she is entitled by herself or her creditors to claim an account of such goods and property.

We order, therefore, that the vouchers in support of the account rendered by *The Ceylon Company* shall be deposited, within one month, in the Registry of this Court, there to remain for two months for examination by Mrs. Bréard and all parties interested.

Costs reserved to abide the event and all other points of the Defendant, reserved also.

SUPREME COURT.

DOCUMENS PASSÉS EN PAYS ÉTRANGER,—LEUR LÉGALISATION,—CONSUL BRITANNIQUE.

Tout document passé en pays étranger doit, pour faire foi en cette Ile, être légalisé par la signature de quelque fonctionnaire public et Anglais résidant en ce pays, un Consul, par exemple, s'il y en a.

DOCUMENT DRAWN UP IN FOREIGN COUNTRY,—THEIR LEGALIZATION ABROAD,—ENGLISH OFFICIAL OR CONSUL.

Document drawn up and executed in a foreign country have no validity in this Island, unless they have been legalized by the signature of some person there in authority and belonging to the British nation, such as an English Consul, if any.

WIDOW POMMEROL,—Plaintiff,

versus

D. MOUTOUSAMY,—Defendant.

Before:

His Honor the Acting CHIEF JUDGE, and
The Honorable Mr. Justice ARNAUD.

L. ROUILLARD, —Of Counsel for Plaintiff.
V. BOULLÉ, —Plaintiff's Attorney.
L. CHASTELLIER,—Of Counsel for Defendant.
E. SAUZIER, —Defendant's Attorney.

16*th April* 1867.

The Plaintiff, Mrs. Widow Pommerol, had sold a house to the Defendant, and the price was stipulated payable in a "rente viagère" to the Plaintiff, during her life, afterwards to the Marquis de St. Gilles, her father, during his life.

The act of sale contains a clause to the effect that the Plaintiff, and in her default, her father, would send annually to her attorney in Mauritius "un certificat de vie en bonne forme, faute de la "justification du quel, le paiement de la dite rente "viagère serait provisoirement suspendu jusqu'à "ce qu'il soit produit"

Today, the Plaintiff complains of the non payment of the instalment for the last six months preceding and prays that the sale be declared "nul de plein droit" consistently with the act of sale, and claims damages to the amount of the instalments due: She produces a certificate purporting to be a "Certificat de vie" signed by a Notary at Fougères, in France.

The Defendant objects to the cancellation, on the ground that the certificate is not evidence conformably with the act of sale, in as much as it is not legalized by the signature of an English official in the country where the contract purports to have been signed.

The Plaintiff argues that the certificate bears the signature and stamp of a Notary, in France, and that it is similar to other certificates on which the Defendant had paid previous instalments.

We are of opinion that the objection of the Defendant is valid in law. It is necessary that any document drawn and executed in a foreign country should be legalized by the signature of some person, in authority, of the nation to which belongs the country in which the document is intended to be used. In this case, the document ought to have been legalized by some English Consul or Authority having power to perform such duty.

This is an ancient rule which seems to have been adopted by most nations. It is mentioned in the "Ordonnance de la Marine," title "des Consuls," art. 23. It is there provided that acts sent to foreign countries wherein there are Consuls, have no validity (ne font aucune foi) in France, if they are not legalized by such Consuls. This has been, at all times, the law acted upon in Mauritius.

We are, therefore, of opinion that the "Certificat de vie" in evidence is not sufficient to maintain the Plaintiff's action.

SUPREME COURT

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MANDAT,—SURENCHÈRE DU DIXIÈME.

Le pouvoir d'exproprier est suffisant pour requérir la mise aux enchères de l'immeuble aliéné volontairement et peut tenir lieu de la procuration expresse exigée par le §4 de l'Art. 2,185 C. C.

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POWER OF ATTORNEY,—OUTBIDDING OF ONE TENTH.

The power to sue out execution carries with it that of serving out the notice prescribed by Art. 2,185 of the Civil Code, for making an outbidding of one tenth.

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THE CEYLON COMPANY LIMITED, —Plaintiffs.

versus

A. HIRTH & ORS.,—Defendants.

—

Before:

His Honor the Acting CHIEF JUDGE, and
The Honorable Mr. JUSTICE ARNAUD.

A. LEGALL, —Of Counsel for Plaintiffs.
W. HEWETSON,—Plaintiffs' Attorney.
G. GUIBERT, —Of Counsel for Defendant.
F. ROBERT, —Defendants' Attorney.

—

16*th April* 1867.

In this case, Mrs. widow Prudhomme had sold the sugar estate *Bon Accueil* for the price of £65,000, to Hirth, and the latter had served the necessary notices towards the fixation of his price.

Upon such notices, and within the delay prescribed, *The Ceylon Company*, a mortgage creditor on the Estate, gave notice that he required the Estate to be put up for sale, in compliance with article 2,185 C. C.

The Defendant Hirth abides by the decision of the Court; but widow Prudhomme, the vendor, objects to the right of *The Ceylon Company* to require the Estate to be put up for sale.

She says: 1st. That *The Ceylon Company* is creditor for the balance of an account current which is not liquidated.

We overrule this objection.

The Ceylon Company, holder of an inscription to cover the balance of an account current which may remain due for advances made for the working of the Estate shows a balance which has been sanctioned by the Master; they are clearly creditors and entitled, as such, to protect their rights.

2ndly. Widow Prudhomme says that the power of attorney given to the Plaintiff, the Manager of the Mauritius branch of *The Ceylon Company*, does not give him power to purchase Estates, nay, denies him that power, until special orders. That the power to make an outbidding implies power to purchase, furthermore, that art. 2,185 requires an express power of attorney.

So far as the last objection goes, the meaning and intention of the law is, that the notice requiring the putting up for sale should be signed by the creditor or his attorney expressly appointed for that purpose; in this matter the documents are signed by the Manager of *The Ceylon Company*, we consider that the law, so far, has been complied with, and the real point for consideration of the Court is, whether the power of attorney given to the Manager of the Mauritius branch of *The Ceylon Company*, entitles him to issue and give effect to the notice served by him.

It must be observed, first of all, that the question raised from the pleadings is not the power to purchase an Estate but to make that particular outbidding traced out in Art: 2,185; and we are of opinion that the latter does not necessarily imply the former.

The notice to put up is a conservatory measure the object of which is to protect the rights of mortgaged creditors against the chance of seeing their pledges being disposed of, under its real value.

True it is that it carries with it the obligation, in the creditor who issues out the notice, to offer to purchase if no other bidder comes forward, but this obligation carries with it the possibility, not the necessity, of the Creditor purchasing.

We cannot, on such possibility, refuse the exercise of a highly beneficial right, if such right is not denied by other legal considerations.

The power of attorney given by *The Ceylon Company* to the Manager of the Mauritius branch, contains the clear power to enforce the execution of contracts. We are of opinion that such power gives the right to the Manager, in Mauritius, to take a conservatory measure to the effect of enforcing the payment of a claim, by causing the Estate on which such claim is mortgaged to be sold at its true and real value.

The power to sue out execution carries with it that of serving out the notice to put up, in the terms of Art : 2,185. The point has been so ruled by the Court of Cassation. (Table générale, Surenchère, No. 89.) TROPLONG expresses the same opinion. (Mandat, No. 319.)

We are, therefore, of opinion that the notice served, on the 20th of December 1866, is good and valid.

Judgment against widow Prudhomme, with costs.

SUPREME COURT

BILLET A ORDRE,—PRISE DE CORPS,—CAUTION.

Celui qui se porte caution du paiement d'un billet à ordre, afin de permettre au tireur ou à l'endosseur d'opposer une défense à la demande en paiement du dit Billet, n'est point passible de la contrainte par corps, à moins qu'il ne s'y soit soumis dans l'acte de cautionnement.

PROMISSORY NOTE,—CAPTION OF THE BODY,—SURETY.

Where the drawer or endorser of a Promissory Note obtained leave to defend upon an action for the recovery of the said Promissory Note, on condition that he do furnish security for the amount of such Promissory Note, and the security was furnished but the surety did not bind himself to arrest in execution, the Court ruled that caption of the body could not be awarded against such surety.

ESCLAPON,—Plaintiff.

versus

MARTIN,—Defendant.

Before :

HIS HONOR MR. JUSTICE COLIN and
THE HONORABLE MR. JUSTICE ARNAUD.

A. LEGALL,—Of Counsel for Plaintiff.
F. VICTOR,—Plaintiff's Attorney.
(Defendant not appearing.)

15th March 1867.

In this case, A. LEGALL applied for and obtained Judgment against the Defendant who had given security for the payment of a promissory note due by one Louis Martin to the Plaintiff.

Louis Martin had obtained leave to defend upon the promissory note in question, on condition that he do furnish security for the payment of the sum claimed, in case he should fail in his defence.

Security was given, on the fifth day of October 1866, by the Defendant, at the Registry of this Court.

The Plaintiff having recovered Judgment against Louis Martin, now sued, the present Defendant, on his bond, and Judgment was, as aforesaid, given in his favour.

But LEGALL having applied for arrest in execution, the Court took time to consider the point.

The bail bond says nothing of arrest in execution, and Art. 2,063 forbids Judges to decree arrest in execution except in such cases as are provided for in the preceding Articles or in cases which may subsequently carry, by a positive law, arrest in execution.

Now Article 2060 allows arrest in execution against Judicial sureties, and the sureties of those who are themselves placed within the provisions of the Law of arrest in execution, but provided that such parties have bound themselves to such arrest in execution.

That is to say the law allows a surety of the description of those above mentioned to submit himself to arrest in execution ; but unless he has so submitted himself in his bond or subsequent obligation relative to the bond, the surety is not liable.

The new Ordinance extending arrest in execution to all promissory notes, does not extend it to sureties. The bail bond, as we have stated, contains no such bond as the article required. There is no evidence that the Defendant is a trader ; in the plaint he is not even sued as such ; we are of opinion that arrest in execution does not lie.

The COUR DE CASSATION has held that very principle which we are now laying down. In the case of *Degain* s. v. 26—p. 73 it was ruled that " L'individu non commerçant qui cautionne une dette ou obligation commerciale, n'est pas, à raison de ce fait, assujetti à la contrainte par corps, si d'ailleurs il ne s'y est pas soumis lors du cautionnement."

The argument of Counsel ,in that case, appears to have drawn a distinction between the " cau-

tions Judiciaires" and the "cautions des contraignables par corps." But we do not see the distinction alluded to in the Judgment; the Article 2060 includes both species of suroties in the same paragraph without the slightest distinction, and the notion that once has prevailed that there was a difference between the two, is now, here, generally exploded. *Vide Delvincourt* page 191. DURANTON, No. 470, BOILEUX, BIOCHE.

BAIL COURT.

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CONTRAINTE PAR CORPS,—BALANCE DE COMPTE,—BONS.

Bien que les items d'un compte arreté entre parties soient appuyés par des bons, la contrainte par corps ne pourra être prononcée contre le débiteur, en cas de non paiement.

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ARREST IN EXECUTION,—ACCOUNT STATED,—BONS.

An account stated between parties, the items of which are supported by Bons, will not entitle Plaintiff to claim arrest in execution against Defendant.

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BEERBAL,—Plaintiff.

versus

PAUL ROCHECOUSTE,—Defendant.

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Before:

The Honorable the Acting CHIEF JUDGE.

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E. PELLEREAU,—Of Counsel for Plaintiff.
A. BETUEL, —Plaintiff's Attorney.
(Defendant not appearing.)

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12*th February* 1867.

After looking into this case, for the purpose of ascertaining how far I should be warranted in granting the arrest in execution prayed for, I have to notice that the instrument sued upon is an account stated between parties, into which the four bons and the three receipts have been inserted; that these bons and receipts are now produced in evidence and support of the items of the account stated.

Had the action been brought upon the bons, it would have been my duty to have awarded arrest in execution.

But the Plaintiff having disfigured his title by inserting it into an account stated, the bons have thereby necessarily been deprived of the advantages annexed to them by Law.

Judgment must be recorded for Plaintiff, without arrest in execution.

BAIL COURT.

—

VOL,—ACTE D'ACCUSATION,—APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.

Dans un acte d'accusation les termes de la loi doivent être employés autant que possible "verbatim"; cependant lorsque dans cet acte l'on emploie une expression qui ne se trouve point dans la loi mais qui équivaut à ses termes, l'acte sera valable.

Spécialement, lorsque le prévenu est accusé de vol, il n'est pas nécessaire, à peine de nullité, que l'acte d'accusation porte que le vol a été commis "frauduleusement."

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LARCENY, — CRIMINAL INFORMATION,— APPEAL FROM A CONVICTION OF DISTRICT MAGISTRATE.

It is much better to pursue strictly the words of the statute; yet, where a word not in the statute is substituted in the Indictment for one that is, and the words thus substituted is equivalent to the words used in the statute, the Indictment will be sufficient.

So, for instance, where the prisoner is charged with having stolen certain goods, it is not necessary that the "fraudulent intention" be laid in the Information.

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AMEERALLY & OR.,—Appellants.

versus

THE QUEEN,—Respondent.

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Before:

His Honor the ACTING CHIEF JUDGE.

—

H. WILSON, —Of Counsel for the Appellants.
J. ACKROYD, —Appellants' Attorney.
J. COLIN, —Of Counsel for Respondent.
J. BOUCHET, —Respondent's Attorney.

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20*th March* 1867.

Several grounds have been urged in support of the Appeal from the Judgment of Conviction in this case.

Of those several grounds, one alone is deserving of attention, and that is the first, *viz*: because the fraudulent intention is not laid in the

Information; and yet the Criminal Information charges the Appellants with having wilfully and unlawfully stolen, taken and carried the sum of £202...the property of the then Informant.

What is stealing? to take by theft. What is theft? the act of stealing; and theft is defined to be either an unlawful and felonious taking of another man's good against the owner's knowledge or will, (see JOHNSON'S Dictionary) or the *wrongful* or fraudulent taking and carrying away of the personal goods of another from any place, with a felonious intent to convert them to the taker's use, without the consent of the owner; the word *felonious* being explained to mean that there is no color of right to excuse the act; and the *intent* being to deprive the owner, not *temporarily*, but *permanently* of his property. (ARCHBOLD, Criminal Procedure, p. 246.)

There is no doubt that it is much better to pursue strictly the words of the statute, as it precludes all questions about the meaning of the expression used, yet, where a word not in the statute, is substituted in the Indictment, for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the Indictment will be sufficient; such as *advisedly* for *knowingly*; *maliciously* for *wilfully*. (ARCHBOLD, C. P., p. 51.)

The reason of the certainty required is that the party charged should be made fully aware of the charge preferred, so as to meet it.

But when a prisoner is charged with having wilfully or unlawfully stolen, taken and carried the goods of A., is he not fully made aware of the precise nature of the offense charged against him? Can he be at all embarrassed in his defense either by proving a gift on the part of complainant, or a right of property in the chattel he is said to have fraudulently stolen, taken and carried away?

The word *steal* is, of itself, a sufficient extensive meaning to convey to the mind of a party the precise nature of the offense charged; it tells him that he is accused of a theft, that is, of the wrongful or fraudulent appropriation, to his own use, of another man's goods.

The fraudulent intention having been sufficiently set out in the Information, on the one hand, and the Appellants not having demurred to that Information, on the other, I must dismiss this appeal, with costs, which is done accordingly, affirming, at the same time, the Conviction, with costs.

SUPREME COURT.

NOTAIRE,—CAUTION,—PLACEMENT DE FONDS,—FAIT DE CHARGE.

Le notaire qui a reçu des fonds pour être placés sur immeubles et qui n'en rend point compte, ne commet point un fait de charge qui rende la caution responsable.

NOTARY,—SECURITY,—INVESTMENT OF MONEY,—"FAIT DE CHARGE."

The fact of a notary public having received sums of money to be by him vested on real properties, does not form part of the category of acts done "ex necessitate officii" by that public officer in the discharge of his duty; and where the notary does not account for such sum, this is not a "fait de charge" which makes his security answerable.

ASSIGNEES LEMERLE,—Plaintiffs,

versus

CHALINE,—Defendant.

Before:

His Honor The ACTING CHIEF JUDGE and His Honor Mr. JUSTICE ARNAUD.

HON. V. NAZ, —Of Counsel for Plaintiffs.
G. A. RITTER, —Plaintiffs' Attorney.
HON. H. KŒNIG, —Of Counsel for Defendant.
ED. DUVIVIER, —Defendant's Attorney.

21*st June* 1867.

This case comes upon an Order from the ACTING CHIEF JUDGE referring to the Court an application which was made by the Assignees of Lemerle, to the effect of obtaining the validity of a certain opposition which had been lodged under the following circumstances.

On the 6th of December 1842, Chaline, the Defendant, did subscribe a security bond for the fulfilment of the functions, as a Notary, of one Mr. Clement Langlois, in the words of the bond "pour raison de ses fonctions de Notaire."

After the death of the said Langlois, the subscriber of the security bond, Chaline, gave the necessary notice in order to be discharged and to obtain the cancellation of the mortgage inscription granted by him.

To that application the Assignees of Lemerle did lodge an opposition on the 5th of January 1865, and they come into Court, praying to have this opposition validated.

They bring into Court a Judgment of this Court between the present Plaintiffs and the heirs of the said Clément Langlois, of the 3rd of August 1865, whereby, in default of an Account having been rendered by the said heirs, as prayed for, they have recovered Judgment in the sum of $30,000 against the said heirs.

They claim to be paid out of the sum of £1,200 which has been held by mortgage on Chaline's Estates, to cover the security bond signed by him, in 1842. They say that, by their Judgment of the 3rd August 1865, they are entitled to recover against the security; that such Judgment and the facts which appear from the Record

thereof show the claim of Lemerle against Langlois to be one which has existed against the latter as a Notary acting within the scope of his functions.

For Chaline it is contended that the Judgment given against the heirs of Langlois has not and could not decide the question whether the debt of the latter was or was not incurred for acts done as a Notary. Secondly: That the documents, in the case, prove Langlois to have acted as friend and agent of Lemerle, not as a Notary.

It is clear that we cannot admit the Judgment against the heirs of Langlois to have any effect upon the present Defendant who was no party to it, even if it decided anything relative to the present issue, but it says nothing on the point, so that the question comes entire before the Court and is: whether, from the facts of the case, the claim of Lemerle exists under circumstances that we can, consistently with the law of Notaries, charge it against the surety.

The security is given for the due fulfilment, by a Notary, of his functions; it purports to reserve a sum to answer the payment of claims privileged under P. 7 of Art. 2102 of the CIVIL CODE, that is, for the case where the Notary has committed some fault or prevarication in the exercice of his functions. We must, first, ascertain what are the functions, of a Notary: Art: 1 of "Arrêt du 14 Pluviose An. XII, says: "Les Notaires sont fonctionnaires publics pour recevoir tous les actes et contrats auxquels les parties doivent ou veulent faire donner le caractère d'authenticité attaché aux actes de l'autorité publique." They are made by law the mandatories of contracting parties for the purpose of giving authenticity to their contracts; within those limits alone can they be said to have fulfilled their functions. This being a matter tending to fix the liability of faults against a third party, is of strict law, and the facts on which a recourse is sought to be obtained against the surety must be brought within the limits traced out by the article above cited.

It may and does often happen, in point of fact, that Notaries are made not only to act for the purpose of giving validity to contracts already agreed upon, but also to initiate the contracts for the parties, previous to their drawing the notarial acts, and to act as depositories of money, in the meanwhile: but in such cases a wide distinction must be made; in contracting for the parties they hold a simple ordinary mandate and are liable under the rules of common law, whilst they come to be liable to the special law on notaries the moment they act as intermediate parties for the purpose of turning any such agreement into a notarial act; it little matters whether parties may have been induced to trust the officer on the faith of his title, the liability of the surety is regulated by law, not by the confidence of parties.

Bearing these principles in view, we are of opinion that the Assignees have not proved from the documents and from the facts stated before us, that the claim of Lemerle against Langlois is for "*faits de charge*" that is for acts done in the fulfilment of his functions as a Notary.

The action entered by them against the heirs of Langlois, which is the ground work of the present application, contradicts their pretention. The Declaration in that case alleges that the said Langlois "did, as such Notary Public, receive, in different occasions, from the year 1850 up to 1862, from the said Plaintiff and from divers parties, for the account of the said Plaintiff, several large sums of money to be, by the said F. C. Langlois, vested on the real properties, and to be by him, the said F. C. Langlois accounted for to the said Plaintiff."

Now, clearly, it is no part of a Notary's duty to receive money for the purpose of investing it on real properties, at his will and choice, upon the condition of accounting for it, and it signifies nothing that the Declaration should say "he has done it as a Notary. Again we are to take the duties of Notary from the law not from statements of parties.

The simple enunciation of that transaction places the case out of the category of acts done *ex necessitate officii* by the public officer in the discharge of his duty.

Moreover, the facts of the present case forcibly suggest the same conclusion. Here we see a party resident in a different District than that in which the Notary is allowed to exercise his functions; the correspondence does not establish a simple relation of notary and client but a close intimacy between the two parties. Lemerle trusts his money to Langlois for him to invest it as he chooses, and he does so during twelve years without even ascertaining the correctness of accounts which now are said to have been fraudulent and fictitious throughout. It has been contended at the Bar that those investments were to have been on real property only, and therefore by notarial acts; and it is inferred from that statement that Langlois must have acted as a Notary. The documents before us do not bear out this statement altogether; for instance, in the accounts rendered for the first year 1850 to 1851 we read this: "Créance Julien Langlois, capital dû en un bon échu le 1er Janvier 1849." Again in the same account the last item runs thus: "la somme de $504,83, a été placée par portions sur divers pour le compte de Lemerle par F. Langlois qui en est personnellement responsable."

It is difficult to infer from such course which is sanctioned by a continuation of trusts for years that Lemerle gave his money with the condition that it would not be invested otherwise than on a real property, and by acts to be drawn by Langlois and by no other.

The facts, such as we can gather them from these documents, show that the money had been placed in the hands of Langlois, in order that he might invest it to the best of the interests of his friend.

It has been contended that the mention of loans appearing to be on real property which, by inference, are called notarial instruments, brings the case within the category of "*faits de charge.*" This we cannot admit, it does not appear that these acts were even drawn up, nay, it has been

stated by the learned Counsel for the Plaintiffs that they had never existed, showing from such a statement that Langlois, in those cases, though he might have pretended to have done so did not in fact, exercise the functions of a Notary.

Two cases have been cited as precedents in point: *Mellotte v Langlois, and Mellotte v Chaline.* (See 1861, page 133 and 1865 page 24.) In the first of these cases the question of liability of surety can hardly be said to have been decided, the case being against the heir and not against the parties interested, that is the sureties. Yet, in that case, Counsel having mooted the point, the Court thought proper to give an opinion which is entirely consistent with the principle we have laid down in the present case. The Court says: "We quite agree with the remark of the learned Counsel for the Defendant, "that every case of money placed in the hands "of a Notary to be invested is not a "*fait de* "*charge,*" that is to say is not necessarily an "intrusting him with money in his official character of a Notary."

In the following case the Court made an application on the fact against the surety and found that Langlois had acted, in the case of *Mellotte*, as a Notary.

But the course of dealing between *Lemerle* and *Langlois*, as proved by the documents before us, can bear no possible comparison with the case of *Mellotte*, and in presence of these facts we are bound to come to the conclusion that no case has been made out against the surety. We, therefore, dismiss the application of the Assignees Lemerle, with costs.

SUPREME COURT.

SOCIÉTÉ,—ARBITRAGE FORCÉ.

Conformément à l'Art. 51 *du Code de Commerce,* "*toute contestation entre associés et pour raison de la société, sera jugée par des Arbitres.*"

Mais si un réglement définitif a eu lieu entre les associés, les contestations qui résultent de ce réglement sont de la compétence des Cours ordinaires et ne sont point soumises à l'arbitrage forcé.

PARTNERSHIP,—COMPULSORY ARBITRATION.

By Art. 51 *of the Code of Commerce all contestations between partners and on account of the co-partnery shall be adjudicated upon by Arbitrators.*

But if a settlement has taken place between partners and is in reality final, contestations touching the execution of that settlement, are matters that come within the ordinary jurisdiction of the Court, and are not subject to compulsory arbitration.

LAGESSE,—Plaintiff,

versus

CAZAUBON,—Defendant.

Before:

His Honor the CHIEF JUDGE and
The Honorable Mr. JUSTICE COLIN.

L. ROUILLARD,—Of Counsel for Plaintiff.
F. VICTOR, —Plaintiff's Attorney.
J. L. COLIN, —Of Counsel for Defendant.
A. PISTON, —Defendant's Attorney.

21*st June* 1867.

In this action the Plaintiff sought to recover from the Defendant, lately his partner, a sum of $648.21, for sums received and not accounted for by the Defendant, on account of the co-partnery. It would appear that the connection between the two parties was dissolved by consent, and that the Plaintiff remained liquidator of the concern.

It also appears that on the 19th November 1865, the parties settled their accounts, the Defendant having to receive a sum of $1,538.91, half of which was paid cash, and half in notes handed over to him, the Defendant, by Plaintiff, and that upon this settlement the Defendant was discharged by the Plaintiff from all debts and liabilities due by the firm Cazaubon and Lagesse, but under the express reservation on the part of Plaintiff of claiming personally from the Defendant all accounts which might have been paid by such debtors whose names figured in the inventory drawn up by Messrs. Giraud and Arékion and which might not have been entered in the books.

To be valid, such accounts must have been paid to Mr. Cazaubon or have been recovered by clerks who would show that they paid over the amount thereof to Mr. Cazaubon.

Several pleas were put in, but one alone, at the present moment, comes under the consideration of the Court, the plea to the Jurisdiction, whereby the Defendant contends that the question being a settlement of accounts between partners should be referred to Arbitrators.

It is very clear to us that the co-partnery has been dissolved and accounts settled between the parties; there has not been, it is true, such a final settlement, as when one partner is paid out of a concern for a certain fixed sum or when the settlement is made *à forfait* or exclusive of any right of warranty on either side; on the contrary, there are here express reservations; whilst paying to the Defendant his share in the business and assuming on himself all past debts and liabilities, the Plaintiff distinctly reserves to himself the right to recover from the Defendant such sums of money as may have been, by him or his clerks, received from debtors, but not borne as receipts in the books.

The reason of these reservations is evident, the partners separate and settle upon the entries in the books; but the Plaintiff says, if you Defendant have received accounts, and have not entered such receipts in the books, and you were the Cashier, you have not accounted for such sums and I reserve to myself, apart from our general settlement, to recover from you, my share of the sum so received, and a reference is made to an inventory made by Messrs. Giraud and Arékion for the names of debtors who may have paid to Cazaubon or to Clerks for him.

Does this alter the fact that a settlement has taken place between partners? by no means, the settlement is made and executed, the reservations point not to a new settlement, not to a change in the position accepted respectively by the two parties, but to this sole fact, that if Cazaubon has received money and has not accounted for it, so that it could not come within the terms of the settlement, without touching the settlement, he shall be held a debtor for such sums of money.

Now Art. 51 of the CODE OF COMMERCE certainly enacts that all contestations between partners and on an account of the co-partnery, shall be adjudicated upon by Arbitrators, in fact, that there shall be compulsory arbitration. But does the Article apply to cases where there is no longer any co-partnery, and where a settlement has taken place between the partners?

The question does not admit of an absolute answer in the affirmative or the negative. When a final settlement has taken place, *à fortiori* when there has been a settlement *à forfait* or exclusive of all warranty, the Article 51 evidently does not apply; by the final settlement all contestations have been closed, the co-partnery has been dissolved if it had not been dissolved before; there are no partners, no co-partnery discussion, no application therefore of the Article which compels parties to go before Arbitrators.

But the case is otherwise, when the co-partnery being dissolved, there has been no settlement, a circumstance which may often take place; there the contestations which arise, are it is true, no longer between partners, but evidently on account of the co-partnery, the accounts of which have not been settled either by consent or by computation.

In such a case compulsory arbitration must find its application.

This doctrine results from the spirit of the Article 51 itself; and the difference between the consequences of a final and a provisional settlement we may gather from two decisions of the Courts which should be read together.

Court of Lyons. § 29. 2. 111.

Court of Cass: § V. 41. 1, 412 *Dupire* versus *Lagache*.

The question before us, therefore, resolves itself into this: can we construe the settlement of the 19th November 1865 as a final or a provisional settlement?

Looking at the fact that the co-partnery is dissolved; that Cazaubon received a fixed sum for his share, and Lagesse, upon this settlement, assumes on himself the liabilities due by the concern, there could be no doubt that this was a final settlement between the parties; what more could be done?

But there are reservations made by Lagesse, and apparently, at least, accepted by Cazaubon, for he received his money under this settlement. Lagesse reserves the right of recovering his share of the accounts received by Cazaubon and not accounted for; does this fact change the nature of the settlement? We think not; it is not said that if errors are discovered, either party may re-open accounts; it is not said that the settlement upon which Cazaubon is to receive a sum which he accepts is to be annulled or modified or even touched; the reservation is expressly for one distinct object; we have settled our accounts, but if you have received from certain debtors whose names appear in an inventory, the sums due by them, I shall call on you to give me my share thereof; if Cazaubon has not placed himself in the predicament pointed out by the reservations in question, the settlement is of course final; if he have, the settlement, as it has been made, is not touched; but Cazaubon shall, apart from the settlement account for what he has received and not entered in the books; every thing is specified; he must himself have received, or if others have done so, they must be shown to have paid over to him.

It is not every debt that the reservations cover; merely such as were due by certain debtors whose names appear in a specified inventory. What is there left after the settlement? a possible claim for certain specific debts, but no more. In fact the claim put in by Lagesse, supposing it to be borne out, on the merits, by the facts, is only the execution of the settlement between the parties; and the case, altho' not so strong, certainly, as the authority we are going to quote, comes within its principles. *Vide Decourteix v Gérard* S. V. 47.2.598.

There, it is true, the settlement had been *à forfait* and carried with it absolute finitude; but the principle is the same; if a settlement between partners is in reality final, contestations touching its execution are matters that come within the ordinary Jurisdiction of the Court, and are not subject to compulsory arbitration.

It is evident, upon this principle, that the Court of Bordeaux, (*S.V.* 1.2.15 *Duc v Taugin & ors*) ruled that a debt alleged to be due by one of the partners in the settlement of accounts, but denied by such partners, might be the object of an ordinary suit and not of a compulsory reference to arbitration.

Whilst, therefore, we cannot go along with the Defendant's argument that Art. 51 does not apply after dissolution of co-partnery, for, many instances may and do occur when it certainly may apply, yet, when there has been a settlement, which evidently is meant to be final, there is an end to compulsory arbitration which was meant to apply to contestations on account of co-partnery and

between partners, but never meant to extend to all questions which may arise upon the interpretation of a contract of settlement, the execution of such settlement, or the like.

Arbitration is always favoured by the Court; some cases are best disposed of by Arbitrators; compulsory arbitration is another matter, quite; and whilst the law which enforces it must be obeyed, it should not be extended beyond the scope and meaning of the article which has created the provision by which, whether they like it or not, parties must refer.

Here, on the facts, we are satisfied that the parties have finally settled, and that the special reservations for a specific object are not intended to change the settlement, but are part of the settlement, and the questions which might arise out of it are relative not to the contract itself, but to the due execution of the same.

The plea of Jurisdiction is overruled, and parties will have to proceed on the merits of the case.

SUPREME COURT.

EXCEPTION EN DROIT.—(DEMURRER),—ACTION EN DOMMAGES ET INTÉRÊTS CONTRE LA COURONNE.

La Couronne ne peut être actionnée en dommages et intérêts pour l'acte de l'un de ses officiers; mais l'Ordonnance 11 *de* 1862, *sur les Chemins de Fer, accorde à toute personne lésée par le fait de la mise en vigueur de la dite Ordonnance le droit de se faire indemniser par le Gouvernement de cette Ile.*

DEMURRER.—PETITION OF RIGHT,—"MONTRANS DE DROIT," — RAILWAY INDEMNITY, — DAMAGES.

No proceedings in the nature of a Petition of rights to recover unliquidated damages can be maintained against the Crown for a wrong committed by its Officers or Agents; but by Ordinance 11 *of* 1862, *on Railways, any damages which may be sustained on account of the said Ordinance may be claimed from the local Government.*

MERCIER & ANOR.,—Plaintiffs,

versus

C. J. BOYLE,—Defendant.

Before:

His Honor the ACTING CHIEF JUDGE and The Honorable Mr. JUSTICE ARNAUD.

J. COLIN, —Of Counsel for Plaintiffs.
E. LAURENT, —Plaintiffs' Attorney.
S. J. DOUGLAS,—Actg. Procureur and Advocate General, of Counsel for Defendant.
J. BOUCHET, —Defendant's Attorney.

16th April 1867.

(See Vol. VI Page 99.)

The Declaration, in this case, alleges that the property of the Plaintiffs, situate in the town of Port Louis, at a place commonly called "Passage Monneron," had been converted into a Dock and Warehouse, when in the year 1861 they were leased at the rate of $500 a month; that although the attention of the Defendant as Chief Commissioner of the Mauritius Railways had been called to the damages the property of the Plaintiffs was likely to sustain from the carrying out of certain projected Railway works, the Defendant, nevertheless, proceeded with the works and caused the two rivulets "Pouce" and "Butte à Tonnier" to operate their junction at the corner of the Plaintiffs' property, with no sufficient egress for the enormous quantity of water carried off by those rivulets, during the heavy rains.

That this evil was increased by the sharp curve given to the canal carrying off the waters of the united streams; which curve, by retarding the flow of the water, raised the level thereof; and also by the erection of a wall 400 feet long by 6 feet in breadth and ten feet high, just across the natural course of "Pouce" and "Butte à Tonnier" rivulets, and at the very spot of their former junction, which wall stopped the flow of waters and caused them to accumulate at the place of the junction now existing at the corner of Plaintiffs' store; that the Defendant, in his aforesaid capacity, further caused the "Passage Monneron" to be shut up by a wooden paling close to the Plaintiffs' property, by reason of which all the waters with accompanying matter coming from the "Passage Monneron" was obstructed and did flow into the said property.

That on the 18th February 1865, during the heavy rains which fell on that day, the whole of the Plaintiffs' property was, by reason of the Defendant's several acts above mentioned, completely inundated by the overflowing waters of the two rivulets increased by the waters of "Passage Monneron" and "Créoles Rivulets," whereby large amount of goods and merchandize were irretrievably lost or damaged, and the lessees of Plaintiffs' house, "J. & J. Brodie & Co.," left the premises immediately after the inundation.

The Declaration concludes by praying that the Defendant, in his capacity aforesaid, be condemned to pay $8,000 as damages for wrongs sustained by Plaintiffs.

This Declaration was demurred as well as pleaded to at the same time.

We have, to-day, to consider only the merits of the demurrer, the grounds of which are twofold:

1o. That the Declaration does not disclose any sufficient cause of action;

2o. That Plaintiffs cannot, in a petition of right, recover damages against the Crown for the alleged causes of action in the Declaration set forth.

The Crown Counsel supported this Demurrer by the same arguments urged by him in a similar case, viz: *Heirs Rondeaux* v. *The Colonial Government*, (Supra, Page, 25) and, again, quoted the authorities then cited by him viz: *Tobin* v. *Queen*. Law Journal, Reports year 1864, Com. Pleas. p. 199 & 215. *Feather* v. *Queen*, Law Journal, Reports. 1866, p. 200—209, in which cases it is laid down as the settled Law of England, that no proceedings in the nature of petition of rights to recover unliquidated damages can be maintained against the Crown for the trespass or wrong of its officer or agents.

J. COLIN, Substitute Procureur General, of Counsel for the Plaintiffs, argued that the damages claimed from the Crown, in this case, were not claimed in consequence of a trespass or tort on the part of the Crown or its Officer, but by reason of an act perfectly lawful in itself, being warranted by the Railway Ordinance, having nevertheless entailed loss on the Plaintiffs, which the Crown is called upon to make good by that very Railway Ordinance No. 11 of 1862, Art. 10, whereby it is enacted that "any compensation for "any damages which may be incurred on account "of the exercise of any other power by this Or- "dinance conferred, shall, in case of dispute, be "fixed in manner following and not otherwise, "viz: by a District Magistrate, when the amount "claimed shall not exceed £100; and by Com- "missioners to be appointed under this Ordinan- "ce, when it shall exceed that sum."

If a right to compensation is given by the Ordinance, how is that right to be enforced without an action against the officers of the Crown?

On the action brought against the agent, the latter in justification, pleads the necessity and legality of the works caused to be done by him in his official capacity with the sanction and approval of the Governor, with the advice and consent of the Council of Government.

The fact of the Defendant having acted with the sanction of the Governor, with the advice of the Council of Government, in execution of the Railway Ordinance, takes this case out of the rule laid down in the Judgments given in favor of the Crown, in England, where the Officers of the Crown had caused a damage to a subject, not in the discharge of their duties, but by a departure from the law of England.

That they should have to bear the consequence of their wrong is but fair and just; that the Crown should not be liable in damages under such circumstances, is equally fair and intelligible.

But in this case the works ordered and done, the cause of the mischief complained of were so ordered and done in obedience to law.

The act of the Defendant is no wrong in law, nor are the sanction and order of the Governor and the Council of Government a departure from the law; but the carrying out of that lawful order of the Governor and Council of Government has, nevertheless, caused a damage. Who is to compensate the Plaintiffs for the damage sustained; the Officer who has merely complied with the lawful order of the Crown? Surely not,—If so the Government must be liable for the compensations sought for.

JUDGMENT.

The facts of the cases referred to by the Crown Counsel, in support of the Demurrer filed in this cause, essentially differ from the facts of the case now before the Court. The English Courts had to consider two cases in which the Officers or agents of the Crown had committed a trespass which had entailed heavy damages on the suppliants.

It was held in *Tobin v Rex*, 1*st*: that the naval officer (Captain Sholto Douglas) by whom the wrongful act was committed was not acting under the authority of Her Majesty, but in the performance of a duty imposed by act of Parliament; 2*nd* That assuming him to have been engaged under the control and directions of the Crown, the act of which he was guilty was not done in execution of the powers to which he was restricted by act of Parliament, but held, 3*rdly*, that no proceedings in the nature of a petition of right, to recover unliquidated damages, could be maintained against the Crown for the *trespasses* of its officers and agents.

In *Feather* v *the Queen*, tried in the QUEEN'S BENCH, the law laid down, as to the irresponsibility of the Crown for the trespasses of its Officers and agents, was asserted by the QUEEN'S BENCH, in these words: "If the effect of the "letters patent was to exclude the Crown from "the use of the Invention secured to FEATHER "by the letters, yet that a petition of right could "not be maintained in respect of the infringe- "ment of the patent right, for the following "reasons: not only is there no precedent for a "petition of right being entertained, in respect "of a wrong in the legal sense of the term, but "if the matter is considered in principle, it be- "comes apparent that the proceedings, by peti- "tion of right, cannot be resorted to by the sub- "ject, *in case of a tort.*"

For, it must be borne in mind that the petition of right unlike a petition addressed to the grace and favor of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at Law or in Equity could be maintained.

The petition must therefore shew, on the face of it, some ground of complaint, which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right, in respect of a wrong in the legal sense of the term, shews no right to legal redress against the Sovereign.

For, the maxim that the KING can do no wrong, applies to personal as well as to political wrongs; and not only wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of a Sovereign.

For, from the maxim that the KING can do no wrong it follows, as a necessary consequence, that the KING cannot authorize wrong; for, to authorize a wrong to be done is to do a wrong, in as much as the wrongful act, when done, becomes in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown discloses no matter of complaint which can entitle the petitioner to redress.

As in the eye of the law no such wrong can be done, so in law no right to redress can arise, and the petition, therefore, which rests on such a foundation falls at once to the ground.

But the facts of the present case are quite different. The facts laid to the charge of the Defendant do not arise from a tort on his part as in *Tobin* and *Feather*, or on the part of the high authority which has ordered the doing of the works. The Government and its Officer were fully warranted by law, in acting as they have done.

But these acts though lawful in themselves have, nevertheless, been attended with mischief. Some compensation, if not already given, surely must be given to the sufferers for the damage sustained.

But by whom is such compensation to be made? By the Officer? But he has been a mere instrument in carrying out the lawful orders of the Crown; why, then, should he be liable for the compensation demanded? Where it shewn that the Officer had not strictly conformed to the orders of the Crown, we should understand that he should be personally liable; because by such a departure from orders, he would have acted without authority, and the Crown would have been fully justified in repudiating the acts of its officer as inconsistent with the order given him.

The Officer in such a case would have committed a tort for which he might have been personally liable, and not the Crown.

But we have not before us any evidence, in this case, of the Defendant having disobeyed the orders of the Crown; no such departure from orders was ever hinted at; and yet in the absence of any tort on the part of the Officer, we are told that this petition of right for unliquidated damages cannot be maintained as disclosing, in the face of it, no matter of complaint which can entitle the petitioner to redress at the hands of the Crown; or in other words, that the subject is to be at the mercy of the Crown, which cannot be, both for the dignity of the Crown and for the rights and liberty of the subject.

In submission to the law the subject is bound to suffer certain lawful acts ordered by the Crown and done by its Officers or Agents, entailing upon him a loss; and yet he is to be without compensation from the Crown Officer who has committed no wrong, and from the Crown which cannot and ought not to be liable; and why? forsooth, because the Crown cannot be made liable for unliquidated damages on a petition of right.

But the liability of the Crown appears to us fully established by the enactment of Ordinance No. 11 of 1863, Art. 10, which provides that: "Compensation for any damages which may be "incurred on account of the exercise of any "other power by this Ordinance conferred, "shall, in case of dispute, be fixed in such and "such another manner."

Assuming, of course, the existence of the damages complained of as consequential upon the existence of the works lawfully ordered by the Crown and performed by its Officers, in strict accordance with the orders given and received, it appears to us that, by virtue of the Colonial law, compensation is due.

If so, the Declaration discloses on its face a matterof complaint entitling the petitioner to redress.

Hence, it follows, that the Demurrer filed, grounded as it is on the fact of its not disclosing any sufficient cause of action against the Crown, by way of petition of right, is bad in law and must be overruled.

It is, accordingly, overruled, with costs.

BAIL COURT.

MEUBLES ET IMMEUBLES,—CONSTRUCTIONS ÉLEVÉES SUR LE TERRAIN D'AUTRUI,—INDEMNITÉ,—COMPÉTENCE DU MAGISTRAT DE DISTRICT, ART. 555 DU C.C.

Bien qu'une action immobilière ne soit point de la compétence du Magistrat de District, et que les constructions élevées à perpétuelle demeure soient considérées par la loi comme des immeubles, cependant lorsqu'un locataire aura élevé des constructions avec des matériaux lui appartenant, sur le terrain du propriétaire, le Magistrat aura compétence pour entendre une action à la requête du locataire réclamant au propriétaire le droit d'enlever ses matériaux ou une indemnité n'excédant pas £250.

MOVEABLES AND IMMOVEABLES, — BUILDINGS ERECTED ON THE PROPERTY OF A THIRD PARTY,—INDEMNITY,—JURISDICTION OF THE DISTRICT MAGISTRATE,—ART. 555 OF THE C.C.

Buildings fixed to the ground are by law immoveable property, and the District Magistrate has no jurisdiction in any action wherein any title to any land tenements or real estate is in question.

But when a lessee has set up buildings, with materials of his own on the property leased, he is entitled to apply to the District Court in order to compel the landlord to elect in allowing the buildings to be removed or keeping the same and paying to the lessee an indemnity not exceeding £50.

FELINE,—Appellant,

versus

GOURDIN,—Respondent.

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Before:
His Honor Mr. JUSTICE COLIN.

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W. D. BOLTON,—Of Counsel for Appellant.
N. SIOARD, —Appellant's Attorney.
E. PELLEREAU, —Of Counsel for Respondent.
C. RODESSE, —Respondent's Attorney.

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21*st June* 1867.

Before the District Court of Pamplemousses the Respondent then Plaintiff, had entered an action against the Defendant, now Appellant, to obtain an Order to demolish and remove from a portion of ground by him let from Defendant's father, the former proprietor of the said ground, a certain wooden building, tin covered, and built by the said Plaintiff on the piece of land in question, and in case the Defendant refused to allow the Plaintiff to exercise that right and preferred paying the value of the said building, the Plaintiff claimed a sum of $250, being, as he alleged, the value of such building.

The Defendant, in the District Court, pleaded to the jurisdiction of the Court; that plea was overruled; the parties proceeded upon the merit of the case and Judgment was finally given, on 19th February 1867, in favor of the Plaintiff, the value of the building being reduced from £50 to £25 which the Defendant was ordered to pay, failing which the Plaintiff was allowed to remove the said house from the ground, within a reasonable delay.

Against that Judgment an Appeal was entered.

JUDGMENT.

Although the reasons of Appeal contain several grounds on which the Judgment of the District Court is challenged, one only was argued before this Court, that which went to the jurisdiction of the Court below: District Courts having no power to deal with questions of real property. Article 555 enacts that if a third party has erected building or works on ground not his own, the proprietor of the ground may either call upon him to remove the buildings without indemnity, or if he prefers it, he may keep the same, paying for the value of the materials used and the price of labour, and no more.

The action, here, is by the tenant to call on his landlord or landlord's assignee to elect, keep, and indemnify or allow the removal of the materials used.

If any question arose as to the right of accession or *quo ad proprietatem*, the question would be, by its nature, real.

But a question of indemnity or the removal of the more congeries of planks and tin, is personal, if it is apparent that there is nothing beyond this. To ascertain whether the question is really reduced to such slender proportions and that really no other question is involved in the solution of this principal one, it was necessary to inquire whether the building in question was erected before or after the tenancy and by whom.

It was quite plain that the Plaintiff was out of Court if he did not prove that as a tenant he built the same with materials of his own, the value of which he might claim.

But if it be true that his case is such as he set it forth, no question to land or ownership, can arise and unless stopped by some contract or waiver of right, he can claim the value of his materials and price of labour, or the materials themselves.

The Magistrate has inquired into the facts which, to his satisfaction, made out the Plaintiff's case.

It was shown that the building in question was built on Defendant's land by the Plaintiff and with materials belonging to him, the Plaintiff. The issue is resolved into one of indemnity if the landowner keep the building; or if he declines to keep the building, the Plaintiff takes away and removes the demolished component parts of that which, by the landowner's choice, has ceased to be incorporated with the land.

The Court finds nothing in the facts or in the issues that could take away the Magistrate's jurisdiction; if it be true that most cases that are at all connected with land are real by their very nature, yet it may happen and it has happened that other like question of rent, of indemnity, may be connected with land, and yet leave perfectly untouched any right to or over the land, and are cognisable by the District Court, provided the amount claimed do not exceed its jurisdiction.

The Appeal must be dismissed, with costs.

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SUPREME COURT.

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MINEUR,—VENTE D'IMMEUBLE,—VENTE JUDICIAIRE,—ACTION EN NULLITÉ DE LA VENTE.

Lorsqu'un immeuble appartenant à deux mineurs aura été vendu par voie de vente judiciaire, à la requête de la mère agissant comme tutrice d'un seul de ses enfants, l'autre mineur ne pourra, lors de son émancipation et assisté par sa mère agissant comme curateur à l'émancipation, demander la nullité de la dite vente.

—

MINOR,—SALE OF IMMOVEABLE PROPERTY,—JUDICIAL SALE,—ACTION IN NULLITY OF THE SALE.

Where an immoveable property, belonging to two minor children, was sold by way of judicial sale, at the request of the mother acting as legal guar-

dian to one of her said children only, and afterwards the other child, being duly emancipated and assisted by her said mother as Curator to the emancipation, claimed the nullity of such sale, the Court ruled that to entertain such an application would appear an encouragement to fraud and immorality, and that the action ought to be dismissed in its present state.

—

TIRSELVON & ANOR.,—Plaintiffs,

versus

E. J. HERCHENRODER & ORS,—Defendants.

—

Before:

His Honor Mr. JUSTICE COLIN and
His Honor Mr. JUSTICE ARNAUD.

—

G. GUIBERT, —Of Counsel for Plaintiffs.
A. ASTRUC, —Plaintiffs' Attorney.
J. COLIN, —Of Counsel for Defendants.
E. DUVIVIER, —Defendants' Attorney.

—

21*st June* 1867.

In this case, Widow Raphaël, now in the case as curator to the Plaintiffs, was the mother of two children, one Moïse Tirselvon and Raphaël Tirselvon born, a posthumous child, in December 1849. She had asked and obtained, with the consent of a family council, the judicial sale of a house being in the succession of her late husband.

The house was sold at the bar, on the 5th of February 1851; subsequently resold by "Folle Enchère" and bought by Margeot represented by the Defendants as his assignees, on the 12th of April 1851. This sale was made by the guardian, the Widow Tirselvon, at the request of Moïse Tirselvon, alone.

To-day the other child, Raphaël Tirselvon, emancipated by his mother and assisted by her as his curator, asks the nullity, by "*tierce opposition*" of all the proceedings made towards the sale of the house in question, on the ground that he ought to have been made a party to such proceedings.

A preliminary objection has been taken by MR. JULES COLIN for the assignees, to the effect that Widow Tirselvon cannot appear as Plaintiff to ask the nullity of proceedings, the nullity being of her own making.

It is answered by GUIBERT that she does not appear as Plaintiff, but simply to assist the Plaintiff who is an emancipated minor.

We are of opinion that the action cannot be maintained as it is entered, that is with the assistance of the very party whose fault is brought forward as the grievance for which redress is asked at the hands of the Court.

This is not an action in which the minor is made Defendant, but on the contrary it is an action the initiation of which is taken by the minor and his curator, and the sole ground on which the action is founded is the fault of the party who stands as Plaintiff along with her son before the Court. This the Court cannot entertain on the strength of the axiom "*Nemo audiatur turpitudinem suam allegans.*" It has been ruled that a guardian could claim the nullity of a sale made by himself to the prejudice of a minor, but the case of BARRET *v* GÉNIN, (S. 37. 1. 114) is very different; there the question came, the minor assisted by his guardian being Defendant not Plaintiff as in this case. Moreover the party who prayed the nullity, *i e* the purchaser of the minor's property, was himself the sub-guardian, that is a party in fault himself. Moreover the defence of the minor was not only that the sale had been made contrary to law, but that his rights had been prejudiced by "*lésion.*"

None of these elements appear in this case, here we have a party who, as guardian, has sold property which she gave out to be the property of one of her children, and she comes afterwards in the capacity of curator of the other child and complains of the deceit she has practised and claims the benefit of such an act, on the ground of that fact and no other.

We are of opinion that to entertain such an application would appear an encouragement to fraud and immorality and that the action should be dismissed in its present state. Costs divided.

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SUPREME COURT.

—

COMPENSATION,—CESSION DE BIENS.

Des billets non échus, souscrits par un débiteur qui fait Cession de Biens, ne peuvent être opposés en compensation d'une créance exigible formant partie de l'Actif de la dite Cession de Biens.

—

SET-OFF,—CESSIO BONORUM.

Promissory notes subscribed by a party who has filed a Petition to make a Cessio Bonorum cannot be offered in compensation, if they were not due at the date of the filing of such Petition, against a claim due forming part of the assets of such Petitioner.

—

LAURENT AND WIFE,—Plaintiffs,

versus

CAMPBELL AND ORS.,—Defendants.

—

Before:

His Honor the ACTING CHIEF JUDGE and
The Honorable Mr. JUSTICE COLIN.

—

J. L. COLIN, —Of Counsel for Plaintiffs.
E. LAURENT, —Attorney for the same.
HON. H. KŒNIG,—Of Counsel for Defendants.
J. PIGNÉGUY, —Defendant's Attorney.

6th August 1867.

In this case the Plaintiffs sue the Defendant Campbell in his capacity of Official Assignee in the matter of the consolidated applications for a "Cessio Bonorum" of Widow Eugène Bazire, Widow Emile Vaudagne and Pierre Ivanoff Lepoigneur; the Widow Bazire and Widow Vaudagne as heirs each for $\frac{1}{3}$ of the late Pierre Victor Lanougarède, their father, and Pierre Ivanoff Lepoigneur, as heir of the last third, (on account of the renunciation by his sister and brother) of the late Pierre Victor Lanougarède, by representation of his late mother Laure Paméla, the deceased widow of the late Volcy Lepoigneur.

2ndly. Ernest Guyomard Préaudet, and 3rdly. Edouard Serendat, the two last as creditors' Assignees to the said "Cessio Bonorum," and as far as need be: 1o. Marie Anaïs Lanougarède, the widow of the late Charles Eugène Bazire, as heiress of the late Pierre Victor Lanougarède, her father deceased. 2o. Victoire Sidonie Lanougarède, the widow of the late Emile Vaudagne, as heiress of the said late Pierre Victor Lanougarède, her father, deceased. 3o. Pierre Ivanoff Lepoigneur, acting as heir of the late Pierre Victor Lanougarède, his grand father. by representation of Laure Paméla Lanougarède, the deceased widow of the late Volcy Lepoigneur, his mother.

The Declaration alleges that by an act passed before Notary Pelte and his colleague, of the 30th November 1863, duly registered, Eugéne Laurent and wife, did for the reasons therein recited, acknowledge themselves indebted to the late Victor Lanougarède, in the sum of $45,070.29c., which they had bound themselves to pay to the said Lanougarède, with interests at 9 p o|o per annum, and as guarantee the said Laurent and wife mortgaged the 3|8ths belonging to them of the Estates "*California*" and "*Rosalie.*"

That by an Act passed before the said Notary Pelte and his colleague, of the 1st December 1863, duly registered, the said Laurent and wife sold, to the said Victor Lanougarède, the two undivided eighths out of the 3|8ths belonging to them of said two Sugar Estates "*California*" and "*Rosalie.*"

That it was agreed that the 2|8ths should be repurchased by the vendors, within 3 years.

That during these 3 years, Laurent and wife should retain the enjoyment and possesion of the said two eighths by them sold, and that the said Lanougarède, at the expiration of the said 3 years, should pay his purchase price by setting off the sum due to him, in virtue of the obligation of the 30th November 1863, if Laurent and wife had not, before, taken advantage of their right of repurchase.

That it was further stipulated that during the 3 years, Lanougarède should preserve all the rights of mortgage granted to him by the Notarial Act of the 30th November 1863, and that the interest of the sum of $45,070.29c. should continue to run on his behalf, and that the said Lanougarède should not claim the payment of the said sum of $45,070 29c. in principal, and the interests thereof, until the 25th November 1866,

That according to an act under private signatures, made double between parties, on the 15th December 1863, duly registered, it was stipulated that in order to facilitate the repurchase, by Laurent and wife, of the said two eighths, another year was granted to them for such repurchase, provided they paid off to Lanougarède, before the 25th November 1867, the 1|2 of the sum of $57,200, being the amount in principal and interests, up to the 25th November 1867, of the obligation subscribed by Laurent and wife to Lanougarède, on the 30th November 1863, and the other 1|2 of the said sum before the 25th November 1867.

That the contents of the deed of sale of the 1st December 1863, and of the act under private signatures of the 15th December 1863, clearly shew that the sale was a mere guarantee of the obligation of the 30th November 1863.

That Laurent and wife are themselves creditors of the estate and succession of Lanougarède represented by the said Defendants, in the sum of $54,435 29 c., being the amount in principal and interest, up to the 30th March 1867, of certain accounts, writings obligatory and promissory notes.

That the Plaintiffs wishing to free themselves of the amount of the said obligation, by a set off of the similar sum due to them on the said promissory notes subscribed and endorsed by the said Lanougarède or by his heirs or representatives and in virtue of several accounts and other obligations accepted or subscribed by them, of which the Plaintiffs were bearers, the whole being now due, had made known to the said heirs Lanougarède that they would not take advantage of the delays granted to them by the several acts and deeds passed between them and the late Lanougarède, for the specific proposition of the set off above mentioned, and had appointed the twentieth March 1867 as the day on which their obligation should become due and should be extinguished by the said set off.

The Plaintiffs conclude their Declaration by demanding of the Court, here to declare and adjudge that the obligation of the 30th November 1863, in favor of Lanougarède, amounting on the 20th March 1867, to the sum of $ 54,422. 38 c., that is to say the sum of $45,070 29 c. in principal, and $ 9,352 09 c. in interest, from 30th November 1863 to the 30th March 1867, is, in fact, compensated by the said claim of the Plaintiffs and therefore exists no more, and is finally extinguished by the set off of the debts of Lanougarède and of his heirs and representatives, which the Plaintiffs offer and are ready to deliver up duly acquitted and discharged.

The Plaintiffs further demand that the Court do order the erasure of the inscriptions taken

by Lanougarède against them, on the 20th December 1861, Vol. 120 No. 219, and on the 30th November 1863, Vol. 131 No. 255; and moreover that the Plaintiffs do resume the property of the two undivided eights of the estates "*California*" and "*Rosalie*," by them sold (à réméré) to the said Lanougarède, as a guarantee of the aforesaid obligation, and which said sale by the extinction of the above obligation, has no more any cause.

The Defendants, Widow Bazire, Widow Vaudagne and Pierre Ivanoff Lepoigneur pleaded that they would abide by any decision of the Court, claiming costs against Plaintiffs.

The other Defendants Campbell, Préaudet and Edouard Serendat, in their respective capacities above stated, protesting that the Plaintiffs had any right of action against them, specifically traversed and denied, in manner and form, the Declaration; and for a plea, in this behalf, say that the pretention of Plaintiffs to free themselves from their debt to the Estate of the late Lanougarède, by means of a set off, is not admissible in law. That the set off proposed by the Plaintiffs *after* the filing by Widow Bazire, Widow Vaudagne and Pierre Ivanoff Lepoigneur, of their petition for a "Cessio Bonorum," and grounded on bills, notes and other writings obligatory which have become due *since* and *pending* the aforesaid application for a "Cessio Bonorum," cannot be admitted to the prejudice of the creditors of the said Widow Bazire, Widow Vaudagne and Pierre Ivanoff Lepoigneur.

That the notice served at the request of the Plaintiffs upon the heirs and representatives of the late Pierre Victor Lanougarède, on the 11th December, that is to say, on the day previous to the filing of the aforesaid petition for a "Cessio Bonorum" cannot have had for effect to make and render due and claimable, and as such opposable by way of set off to the Estate of the late Pierre Victor Lanougarède, titles, of which the date of maturity had not yet come.

That the Plaintiffs are not and never have been regularly and legally bearers of the titles upon which they ground their prayer for a set-off.

The original hearing of this case led to an interlocutory decree under the date of the 16th October 1866, (see 1866, page 164,) authorizing the Master to certify to the Court, within one month from the above date, which, if any, of the promissory notes founded on this case, were claimed upon by other persons, and at what dates; all rights and pleas of parties and questions of costs reserved.

In obedience to the above interlocutory decree, the Master certified certain facts shewing: 1o. That the 13 promissory notes founded upon by Plaintiffs had been affirmed and proved by Serendat, on the 5th of January 1866, amounting to $16,973.47

2o. That the promissory note of $1,000, falling due on the 20th February 1866, had been affirmed and proved by Bruneau Duhaut, on the 30th December 1865 .. .. 1,000.00

The whole amounting to $17,973.47

The other claims sought to be set-off against the claim of the assignees Lanougarède, bear on the face of them, no evidence of proof, either by the original holders of Lanougarède's obligations, nor by Laurent.

Many of them appear to have become due only after or by reason of the petition for a "Cessio Bonorum" by the Heirs Lanougarède.

We had, therefore, before us two sets of bills or obligations. Some due before and at the date of the petition for a "Cessio Bonorum" and proved by other parties then Laurent and wife, and others rendered due by the fact of the petition, but not affirmed.

Nevertheless the Plaintiffs considered themselves entitled to set-off the whole of the bills and obligations above mentioned. One of the Judges who had not heard the arguments urged at the original hearing for and against the admission of the set-off, not being in a position to express an opinion on the merits of the Master's Report, the Court by its interlocutory decree of the 12th February 1867, ordered a fresh argument which was entered upon on 22nd of the last mentioned month and resumed on the 29th March last.

J. COLIN, of Counsel for the Plaintiffs, after having enumerated the facts above stated viz: the origin of Laurent and wife's debt to Lanougarède; the mortgage of the 3[8 of *California* and *Rosalie*, and the sale "à réméré" by Laurent and wife, of the 2[8ths of those 2 Estates to Lanougarède, the extension of the time of redemption of the 2[8ths sold, contended that the sale "à réméré" was not an absolute sale but a mere additional guarantee of the Mortgage debt resting on the 3[8ths of *California* and *Rosalie*."

That such was the nature of the sale was shewn by the stipulation that Laurent and wife should continue in the possession and enjoyment of the subject matter of the sale; that Lanougarède should preserve his mortgage, for his principal and interest, on the 3[8ths of *California* and *Rosalie* and that in default by Laurent and wife of redeeming the 2[8ths sold, Lanougarède would be entitled to pay his purchase price of the 2[8ths by setting off the amount of his mortgage debt on *California* and *Rosalie*.

That before the enlarged time of redemption had expired, Laurent and wife had given notice to the heirs and representatives Lanougarède that they, the Plaintiffs, would wait the time stipulated in their favor for the exercise of their right of redemption; that true it was that this notice had been served upon the heirs and representatives Lanougarède, on the eve only of the application made by the heirs and representatives of Lanougarède for a "Cessio Bonorum," that true it was also, that some of the bills of which Laurent and wife intended to set off against the claim of Lanougarède, had become due, as a necessary consequence of the application for a "Cessio Bonorum" and had been proved by the bearers thereof, on that application; that true it was, again, that other obligations and

accounts intended to be set off against the claim of Lanougarède had never been proved, either by Laurent and wife or any of the original creditors of Lanougarède and had become due only after and in consequence of the application for a Cessio Bonorum; that nevertheless, Laurent and wife, present holders of those bills, claims, obligations and accounts were fully warranted in law to set off this claim of theirs against the claim of Lanougarède's heirs and representatives against himself and wife.

Colin supported the right claimed on the enactment of Art: 1,290 C.C. which says that:

"La compensation s'opère de *plein droit* par "la seule force de la loi, même à l'insu des débi- "teurs; les deux dettes s'éteignent réciproque- "ment à l'instant ou elles se trouvent exister "à la fois, jusqu'à concurrence de leurs quotités "respectives."

That a set off may, under the French law, take place on a "Cessio Bonorum"; that the Colonial "Cessio Bonorum" or Insolvency Ordinance, far from preventing one debt being set off against another debt recognizes the existence of such a right. The Amending Bankruptcy and Insolvency Ordinance, Art. 23, says that: whenever any doubt or difficulty shall arise, touching the carrying into effect of any provisions of the said Ordinance No 23 of 1856, the provisions of the said Ordinance No 33 of 1853 shall be referred to and applied as containing provisions applicable to such matter.

That on reference to Art: 110 of the Bankruptcy Ordinance it may be ascertained that where there has been mutual credit a set off is a matter of right.

On the other side it was contended by Kœnig that the sale of the 2[8ths of *California* and *Rosalie* was an absolute sale, the delivery of the subject being delayed for the convenience of party; that so true was this that Lanougarède agrees to mortgage the subject sold, in case such mortgage were necessary for the wants of the Estate And why this agreement if Lanougarède were not the proprietor of the 2[8ths above mentioned? If he were not, such an agreement was perfectly useless. But its existence clearly proves the absoluteness of the sale.

If so what becomes of the allegation of the sale having been made for the better guaranteeing Laurent's mortgage? That the sale should have been required by Laurent, as an additional guarantee of his mortgage claim, in no wise affects the nature of the contract between parties viz: A sale "a réméré" of the 2[8ths of the 2 estates above mentioned.

The sale being an absolute one, the necessary logical and legal inference was that if the Plaintiffs wish to resume the ownership of the subject sold, they must comply with the requirements of Art. 1673. C. C., by paying to the Heirs Lanougarède or their representatives, the amount &c, paid by Lanougarède for his purchase.

This they profess to be ready and willing to do, *not in specie*, but by means of a *set off* which they maintain to be practicable and a matter of right, under our Colonial "Cessio Bonorum" and Bankruptcy Ordinances.

There was no doubt that whenever two persons were respectively indebted to each, before a "Cessio Bonorum" or Brankruptcy, the two debts are extinguished by compensation. (Art. 1290. C. C.)

But not so when the maturity of one of the debts, not yet reached, is hastened on by the mere fact and in consequence of the "Cessio Bonorum" or Bankruptcy. In such case compensation is impossible as stated in Art: 1298 C. C. viz:

"La compensation n'a pas lieu au préjudice des droits acquis à un tiers; ainsi celui qui étant débiteur, est devenu créancier depuis la saisie-arrêt faite par un tiers, entre ses mains, ne peut, au préjudice du saisissant, opposer la compensation."

By Art. 15 of Ord. No. 23 of 1856, it is enacted that forthwith upon the filing of any petition for a "Cessio Bonorum," the Official Assignee is to be appointed and sent into possession of all the personal estates and effects, the rents and profits of the petitioner &c, which he is empowered, by Art. 17, to sell and otherwise to dispose of. That the filing of any petition for a Cessio Bonorum shall constitute (Art: 42) in favor of the mass of the creditors of the petitioner, a general mortgage which the official assignee is required (Art. 43) immediately, on his appointment, to enforce by an inscription which (Art. 44) is to inure to the benefit of the mass of the creditors.

Allowing a compensation, in such a matter, would be defeating the end aimed at by the Colonial Ordinance, (viz:) equality amongst the personal creditors of the Insolvent.

The order which divests the Petitioner, by vesting the whole of his Estates in the assignee appointed by the Court, is neither more nor less than an *attachment by the law*, in the hands of all the debtors to the Insolvent's Estate, 1o. to secure the mass of the personal creditors against any possible loss, and 2o. to protect them against any undue preference.

JUDGMENT.

There is no assimilation possible between the French law of Cessio Bonorum and our Colonial Ordinance, on the same subject.

In the French law, the party applying continues Master of all his rights and Estate, until the assignment of the same to his creditors, and as such is liable to any set-off. But by Our Colonial Ordinance, on the filing of a petition for a "Cessio Bonorum," the official assignee is immediately vested with all the rights, titles and interest of the Insolvent. Further, the filing of such petition constitutes, in favor of the mass of the creditors of the Petitioner, a general mortgage which is to inure to their benefit.

Our " Cessio Bonorum " law is, so far, widely different from the French law, on the same subject, and produces as to non-traders very near the same effect as the French law of Bankruptcy produces as to traders, which law allows of no compensation or set-off, except as to debts become due at one and the same time and before Bankruptcy. As to debts simultaneously due at one and the same time, but after adjudication of Bankruptcy, compensation is impossible beyond the amount of the dividend due by the Bankruptcy. (PARDESSUS, *Droit Commercial*, Vol: 4. No. 1,125 p. 278).

It is true that Bankruptcy and the " Cessio Bonorum " hasten the maturity of all the claims and debts due by the Bankrupt and Insolvent. The reason of this is thus satisfactorily accounted for by PARDESSUS, Vol: 4, No. 1,124 p. 275.

" Lorsqu'un Créancier accorde quelques termes " à son débiteur, c'est sous la condition que ce " dernier conservera sa solvabilité, ainsi que nous " l'avons déjà dit, No. 183 ; la Faillite doit ren- " dre exigibles toutes les dettes du Failli et, en " général, attribuer aux créanciers qui étaient " obligés d'attendre l'arrivée d'un terme quel- " conque, pour exercer son droit, la faculté de " l'exercer de suite.

No. 1125.—Mais " l'éxigibilité dont nous par- " lons n'a pas les mêmes effets que celles qui dé- " riveraient de l'échéance régulière d'un terme " conventionnel,et ne donne pas aux créanciers le " droit de demander ni de recevoir, à l'instant " que la Faillite s'ouvre, le montant intégral de " sa créance ; comme cette exigibilité n'existe que " par la Faillite et par l'évènement qui produit " le dessaisissement,elle est subordonnée à tout ce " qui est la suite naturelle, et notamment à ce " que le créancier ne puisse plus recevoir de paie- " ments, que par le moyen de repartitions qui " auront lieu dans la suite. à moins que la qualité " privilégiée de sa créance ne lui donne quelques " droits de préférence.

" Ainsi cette exigibilité accidentelle ne pro- " duit pas la compensation avec une créance ex- " igible par elle même. S'il pouvait par l'ex- " ception de compensation, éteindre la totalité " de sa dette, il obtiendrait le paiement intégral " de sa créance. et alors il serait mieux traité " que les autres créanciers ; or la compensation " ne peut avoir lieu au préjudice des tiers ; (Art. " 1,298 C. C.) d'ailleurs cette compensation lui " procurerait un paiement par anticipation que " nous verrons plus bas, être interdit; et comme " le même évènement qui rend sa créance exigi- " ble est celui qui ne permet plus que le Failli " fasse volontairement des paiements, il en résulte " l'inadmissibilité de la compensation.

" Par la même raison,appliquée en sens inverse, " celui qui est *créancier* du Failli, pour une *som- " me échue* et *débiteur* d'une *créance à terme*, ne " pourra pas, en renonçant à ce terme, dans le " cas où il a cette faculté, rendre cette somme " compensable avec ce qu'il doit, parceque ce " n'est plus au Failli qu'il devra dans les six mois, " mais bien à la masse de la Faillite. Le Failli " n'étant plus maître de sa fortune, aucun paie- " ment ne peut lui être fait au préjudice de la " *saisie-arrêt* que *prononce la loi* en le *désaisissant* " de l'administration de ses biens, et en ne per- " mettant plus de payer à d'autres qu'aux admi- " nistrateurs qui sont nommés. Pierre, recevra " dans la Faillite le dividende proportionnel de sa " créance, et lorsque sa dette écherra il devra la " payer en entier à la masse. (See also TOUIL- " LIER, *Droit Civil*, Vol. 4, No. 381 p. 458 ").

If, as we believe, our " Cessio Bonorum " law is to be assimilated to the French Bankruptcy law, the reasoning of the writer just quoted militates very forcibly against the admission of the set-off urged in this case.

The thirteen promissory notes, giving a total of $16,973.47, were proved by Serendat on the 5th January 1866, which clearly shews that they were not the property of Laurent and wife, at the date of the " Cessio Bonorum. "

No more was another bill of £1,000 falling due on the 20th February 1866, proved by Bruneau Duhaut, on the 30th December 1865.

These bills cannot clearly be set-off against the debt of Laurent and wife to the heirs and representatives Lanougarède.

But is the set-off to be allowed for the other bill, claims and accounts tendered by Laurent.

By our law of set-off, which is that of France, the Article 1,298 C. C, remaining unchanged, it is very clear to us that no set-off can be allowed, for, Laurent does not place himself within the conditions of the law of set-off ; Laurent has felt this, for, in support of his position,we were strongly pressed to import our law of Bankruptcy into questions like this which is relative to a " Cessio Bonorum " made by a non-trader.

The law of Bankruptcy which, neither in its terms, nor in its spirit, has touched the law of contracts as laid down in our Codes, has so far, indeed, modified, *not the principles* but *the application* of the law of set-off, that it allows a set-off whenever there has been *mutual* credit between the Bankrupt and another party. But in order that there should be *mutual* credit, there must be *mutual debts* or claims convertible into debts, and is it possible to consider as a debt the contract before us which is in all its essence and bearing a contract of sale ? a sale it is true, under the conditions of a redemption at *the will of one* of the parties, within certain delays, but, still, a sale.

If the vendor " a reméré " does not redeem, the sale becomes absolute ; if he does redeem, the sale has not ceased to be a sale, but the redemption operates as a retrocession from the purchaser to the vendor, and no more.

Further the special article relative to set-off in the law of Bankruptcy, enacted to favour mutual credit between traders is no where to be found in our Ordinance touching " Cessio Bonorum, " (Ord. 23 of 1856) nor is it to be traced in our Codes.

The Ordinance No. 23 of 1856, has, it was ur-

ged, been amended by Ord. No. 14 of 1864, which refers both to matters of Bankruptcy and of "Cessio Bonorum."

That is true, but how far? The Ordinance No. 14 of 1864, assimilates in some respects the procedure relative to "Cessio Bonorum" to the procedure relative to Bankrupts, *inter alia* it allows the Court to suspend or refuse to admit a non-trader to the benefit of the Ordinance, a power which was not conferred by the Ordinance 23 of 1856 which allowed the judge to punish the fraudulent non-trader but did not allow him to refuse him the benefit of the act. But there is not a word about extending to "Cossio Bonorum" the special enactment relative to set off in matters of Bankruptcy; there is not the slightest enactment modifying in these cases, the law of set-off; the article 23 upon which Laurent insists, merely enacts that "whenever any doubt or difficulty "shall arise touching the carrying into effect of "any of the provisions of the said Ordinance No. "23 of 1856, the provisions of Ord. No. 33 of "1853 (Bankruptcy) shall be referred to and ap-"plied as containing provisions applicable to such "matter."

But the law of set-off forms no part of the provisions of Ordinance No. 23 of 1856, that Ordinance does not touch it. What doubt or difficulty can arise as to carrying into effect a provision which does not exist? The doubts and difficulties which are to be solved in case of need, by a reference to the Bankruptcy Ordinance, are doubts and difficulties, starting out of the provisions of the Ordinance, but never can be construed into importing into an Ordinance which is silent, new provisions, new enactments foreign to it and not needed for its proper working, since there is the Code to regulate such working. It is, to us, very evident, that this reference to the law of Bankruptcy is intended to give, to the Court, power to act more effectually for the proper working of the procedure and other matters included within the four corners of the Ordinance, by having certain rules, already framed, to guide them, but, in no wise, to change the law, where the legislature has not thought proper to repeat or amend it. The words, difficulties, doubts, provisions of the Ordinance, sufficiently shew this.

We are of opinion that for this series of claims tendered as a set-off, Laurent and wife must fail, save and except for such as were due before the vesting order; we wish to be understood to give Judgment and express our opinion solely on the case as it comes before us, practically, a set-off tendered by Laurent. Whether the claims held by the Plaintiffs can, subsequently, be of any use to them, (beyond receiving a dividend), we distinctly wish to be understood to say nothing—a good deal of ground has been travelled over in the argument before us, our Judgment, however, is to the effect that Laurent and wife, in this action, cannot succeed.

The action is, accordingly, dismissed, but as the case is one *primæ impressionis*, we shall give no costs.

SUPREME COURT.

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FIXATION DE PRIX,—VENTE, EN JUSTICE, D'UN IMMEUBLE DÉPENDANT D'UNE FAILLITE OU D'UNE CESSION DE BIENS.

L'acquéreur d'un immeuble vendu à la barre à la requête des Syndics d'une faillite ou d'une cession de biens, n'est pas tenu de faire fixer son prix lorsqu'il en est requis par un créancier personnel du failli ou de l'insolvable.

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"FIXATION DE PRIX,"—SALE, BY JUDICIAL PROCESS, OF BANKRUPT'S OR INSOLVENT'S PROPERTY.

The purchaser of a real estate sold by the assignees of a Bankrupt or Insolvent is not bound to fulfill the formalities for a "fixation de prix" at the request of an inscribed creditor when such creditor does not hold this hypothec on or against the former proprietors of such estate.

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REY AND ANOR.,—Plaintiffs,

versus

BREMON,—Defendant.

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Before:

The Honorable Mr. JUSTICE COLIN and
The Honorable Mr. JUSTICE ARNAUD.

—

HON. H. KŒNIG,—Of Counsel for Plaintiffs.
J. PIGNEGUY, —Plaintiffs' Attorney.
HON. V. NAZ, —Of Counsel for Defendant.
J. G. TESSIER, —Defendant's Attorney.

—

7th August 1867.

This was an action introduced by Aristide Rey and the three other Plaintiffs to obtain, from the Court, an Order declaring null and void, to all intents and purposes, and of no effect whatever, the Notice served upon by the Defendant Albert Brémon, to the effect of compelling them, the Plaintiffs, to fulfil certain legal formalities to arrive at a "fixation de prix."

Some of the Defendants, to wit: the assignees of the widow Bazire, the widow Vaudagne and Pierre Ivanoff Lepoigneur, who had each of them made a "Cessio Bonorum," put in a plea to the effect that they had no objection to offer to the Plaintiffs' Application.

The other Defendant, Albert Brémon, pleaded that he had a legal and regular Judicial Mortgage on the *Belle Vue* Estate and other Estates of his debtors, which mortgage was in full force.

That, as such mortgage creditor, he was entitled to the rights and privileges attached to

his claim, and more especially to serve the notices and summonses prescribed by law to compel the Plaintiffs to fulfil the formalities prescribed by Article 2,183—C. C.

That no law has dispensed the Plaintiffs from the fulfilment of the said formalities; and 4thly that the Defendant as a mortgage creditor duly inscribed, is not precluded, by the Judgment of adjudication, from exercising and putting in force rights conferred upon him by the Article 2,183, and the other laws of the colony.

The cause came on to be argued on the last day of last term, when

Hon. H. Kœnig: for Plaintiff, argued: That his clients were purchasers, at the Master's Bar, of the Estate "*Belle Vue*" sold by the assignees of Mme. Bazire, Mme. Vaudagne and Pierre Ivanoff Lepoigneur; and the question that arose was this, whether after a sale of an Estate, made upon a "Cessio Bonorum," the purchasers were bound to fix their price. Brémon the Defendant, had given notice that they should do so, but the Plaintiffs urge that this formality is quite unnecessary.

If, for voluntary sales, the law has required such formality, it has restricted it to voluntary sales; and a sale after a "Cessio Bonorum" is not a voluntary sale; in voluntary sales the creditors are not represented; in a sale after Bankruptcy or "Cessio Bonorum," the creditors are represented by the creditors' assignees; they sell in fact through their assignees. Besides, sufficient publicity is given to the sales, and the legislature was so much of this that the Ordinance 36 of 1863, Article 15, enacts that even legal mortgages are cleared.

Hon: V. Naz for Defendant Brémon: "It is true that the Art. 2,181 uses the word acquéreurs, not adjudicataires; but all writers and decisions are of opinion that the word is not to be taken literally, and the word contract means the "titre d'acquisition,"—(Troplong. Priv: and hyp: IV par: 909.)

"Cessio Bonorum" sales are included within that list of sales which are not cleared by the judgment of adjudication, and rightly so from the distinction between such sales and sales when a creditor seizes; certain formalities are prescribed by art. 695 and 696, Code Civil Proc: by which the creditors' interests are sufficiently protected, which formality not being required for sales upon a "Cessio Bonorum" or a Bankruptcy, leave the creditors insufficiently protected if no "fixation de prix" takes place.

It is not correct to say that the assignees represent the creditors; and sect. 15 of the Transcription Ordinance alluded to, provides for quite a different matter, and has quite a specific object.

The Ordinance of 1864, touching "Cessio Bonorum" had made more summary, still, and therefore made more necessary, the "fixation de prix."

Hon: H. Kœnig in reply: The same reasons which renders unnecessary the "fixation de prix" in forced sales (Expropriation forcée) prevail in Bankruptcy; the Estate must be sold, the creditors are represented by the Assignees.

Mr. Justice Colin: But suppose they are hypothec creditors, not creditors of the Bankrupt, and therefore not represented by the Assignees, but having a *jus in rem* on the Estate, would you say that no "fixation de prix" is necessary as to them?

Hon: H. Kœnig; I admit the distinction; the hypothec creditors of anterior proprietors having a *jus in rem*, but no direct claim against the Bankrupt, and the Bankrupt's creditors, stand in a different position. But Brémon is nothing but the holder of a promissory note, having, after judgment, taken a Judicial Mortgage; having also tried, without success, to sell this same Estate which the Court orders to be sold by the Assignees; and it is he, not a creditor of a former proprietor unconnected with the insolvents, who wishes the expensive formality of a "fixation de prix" to be fulfilled. Surely he cannot complain of having had no notice; all that has been said is true, if you find that sales after Bankruptcy are the same as voluntary sales; but the reverse is true; I refer to S. V. 64-1-381.

JUDGMENT.

The Estate *Belle Vue* situate in the District of Flacq, was, at the instance of the Assignees of some of the heirs of the late Victor Lanougarède, sold at the Master's Bar, on the 7th of June 1866, and knocked down to the Plaintiffs.

Mr. Brémon, in reality the sole Defendant in this suit, served upon the Plaintiffs a Notice calling upon them to pay a claim which he held upon the said heirs of the late Lanougarède, for which claim he had obtained Judgment, whereupon he had inscribed a judicial hypothec on all the real property of the said heirs.

The practical object of this Notice would be to compel the Plaintiffs to proceed to the formalities of a "fixation de prix," in terms of Art. 2,183 of the Code Civil, if this be a case in which such formalities ought to be fulfilled.

It is a well ascertained and settled rule that no "fixation de prix" is necessary whenever the sale by judicial process has been forced; ("expropriation forcée") but the Decisions of the Courts of France and the authority of the ablest commentators have also laid down the rule that a "fixation de prix" is necessary, not only when sales of real property are effected by private contract, but also when they take place judicially, provided such sales be voluntary sales: *A priori*, this latter rule ought not to be extended beyond the limits to which past Decisions of the Courts have carried it; such limits are already very wide, and the Arts. 2,182 and 2,183 of the Code, when speaking of the purchaser ("acquéreur") and of his "titre," (deed or act of purchase), making no mention of "adjudicataires," or purchasers at a public sale by auction, or memorandum or Judgment of adjudication, had clearly, for their primary object, to protect hypothec cre-

ditors against private sales of real estates effected for a price really inferior to the real value of such Estates.

The CODE enacted the observance of certain formalities by which the hypothec creditors were to be made aware of the sales, and might, if they wished, by outbidding the original purchase price by one-tenth part of its amount, (Art. 2,185) cause the Estate to be put up for sale, again.

It has been found that this principle involving a positive security, both against fraudulent conveyances and even *bonâ fide* sales of real property effected for a price less than an hypothec creditor might be willing to give, ought to be extended to all voluntary sales although carried on by Judicial process and taking place publicly at the Bar of the Court.

Whether this was really the original intent of the framers of the CODE, and whether the extension of a system useful in a large country like France, is also useful for a small community like that of this Colony, it is not necessary for us to inquire. The law is now distinctly settled both as to forced Judicial sales when the "fixation de prix" is not necessary, and as to voluntary sales when it is necessary.

It must not, however, be lost sight of that the basis upon which the extension of the doctrine to voluntary judicial sales rests, is mainly, if not entirely, this, that hypothec creditors not being parties to voluntary sales, nor being, from the first, personally informed of the same, should not be deprived of the right of making the outbidding of one tenth. It should also be borne in mind that besides the outbidding of one tenth, they have the outbidding of one fourth of the sale price which is in no wise taken away from them, and that all sales by judicial process, whether forced or voluntary, do necessarily receive a certain degree of publicity.

Such being the broad principles of the law, the question that arises in this case is, whether the purchasers, at the Bar of the Master of this Court, of a real Estate sold by judicial process by assignees in matters of Bankruptcy or "Cessio Bonorum," are bound to fulfil the formalities of a "fixation de prix" required for voluntary sales? We are of opinion that there is no absolute rule to be laid down on this subject, but that in certain cases the purchaser is bound to proceed to fulfill such formalities, and in others he is not bound. We are very clearly of opinion that he is bound to "fix his price" when called upon to do so by a hypothec creditor, not of the Bankrupt or Insolvent, but of a prior proprietor of the real Estate, here *ceteribus paribus*; the hypothec creditor has no claim against the bankrupt personally, if he holds a *jus in rem* on the *prœdium* which had become the bankrupts' property, he does so in virtue of this "droit de suite" by which until his hypothec is legally made to disappear, he grasps, as it were, the *prœdium*, by the force of his lien; but that lien is exercised upon the *prœdium* quite irrespective of any claim against the Bankrupt or Insolvent, personally.

He is not represented at the sale of the real Estate, he does not want to prove his claim against the Bankrupt's Estate; if his hypothec is swept away by the fact that superior privileges or prior hypothecs take up the whole sale price of such real Estate, he has not (unless new contracts have modified his position), lost his personal claim against his original debtor, such creditor, therefore, may fairly say, that the sale at the Bar is as far as he is concerned, voluntary; that he has no notice of it direct or implied by law, and claim the benefit of a "fixation de prix" upon the strength of the principle we have alluded to above.

But the creditor, whose debtor is the Bankrupt or Insolvent, who is represented by the Assignees, who may be said to sell by and through the Assignees of his choice or the Assignees to whose choice it was his right and duty to participate, who has no connection whatever with the prœdium sold, except through the Bankrupt or Insolvent, we are also clearly of opinion is not entitled to call upon the purchaser at a public judicial sale to prevent a "fixation de prix."

Why should the principle of law originally framed for voluntary sales, and already, as we have said, very widely extended, be still further extended to such creditor? who better than himself can know that the Estate is to be sold? since it is sold by his very assignee, not only after the publicity more or less widely given to all Judicial sales, but after the publicity given to the proceedings in bankruptcy or insolvency; proceedings of which he may, if he likes, in most cases he should at least, make himself cognisant of.

On what reasonable ground saddle a bankrupt Estate with the considerable legal expenses attending "a fixation de prix? expenses which by the very nature of the formalities required, increase as the number of creditors increases. We find in the law no reason to sanction this, and judging of the case by the bearing of the whole system of the CODE upon this particular point, we think the application unwarranted and useless.

Our view of the case and the distinction we have laid down between the bankrupt's creditors and the creditors of former proprietors of the Estate, we find supported by several decisions of the Supreme Court of FRANCE; *inter alia* in the case of *Arnouts v Syndics Arnouts* (S. V. 64. 1.381.)

That Court has, by a decree reversing the Judgment of the "Cour de Douai," laid down the law in this sense: that the assignees sell for the common interest of all the bankrupt's creditors who must be held to have had knowledge of the sale, and therefore that an inscribed creditor of the bankrupt could not claim a "fixation de prix;" admitting at the same time that the formalities in question might be required "en vue de droits distincts ou d'intérêts spéciaux qui, à raison de leur nature ou des conditions qui leur seraient propres, ne seraient pas soumises aux règles générales de la faillite." And a very common and generally clear illustration of these distinct rights and special interests, we have given, in the case of a hypothec creditor of a former proprietor of the Estate.

This decision of the Court of Cassation does not stand alone. The Court of ORLEANS in *Devangermès v Leprince and ors.* (S. V. 50.2.325.) had laid down the same principle, and the COUR DE CASSATION (S. V. 51.1.270) affirmed on appeal the decision of the Court of ORLEANS. The Cour de NÎMES (*Frontignon v Bravay & Creix*) has also ruled the point in the same manner.

It is unnecessary, we think, to take notice of arguments arising out of the new Art. 772 and 777 of the amended FRENCH CODE OF CIVIL PROCEDURE; the amended FRENCH CODE is not our CODE, except when a local Ordinance has adopted and enacted for this Colony, such particular amendments; which is not the case here; but even in FRANCE, the COUR DE CASSATION in its last Decision of 1864, has held that the above quoted new articles left the law, on this point, as it stood.

We may, we believe, be satisfied that our Decision of this *vexata quæstio* should rest on the reasons we have given in its support and the authority of the Decisions of the COUR DE CASSATION. TROPLONG, it is true, holds a different opinion and quotes a Decision of the Cour de CAEN in support of his opinion; TROPLONG, however, takes no notice of the distinction, a most important, and we hold an essential one which forms the basis of the Decisions of the COUR DE CASSATION and which we have adopted; and were we to be guided solely by the light of Authority, it is difficult for us to hold that a Decision however respectable of the Cour de CAEN in 1825, can outweight the two successive decrees of the COUR DE CASSATION, which we have quoted.

The argument on both sides at the Bar has gone a good deal upon the question whether a judicial sale by assignees after Bankruptcy or "Cessio Bonorum" should rather be assimilated to a voluntary sale or to a forced sale.

We are of opinion that the issue before us is best decided by the reasons which we have given. Sales of real Estate carried on after Bankruptcy, by assignees, can hardly be called voluntary sales; there may be exceptions, but, as a general rule, assignees must sell; the time of selling is quite another matter; but if the real property of the Bankrupt has not been seized by a creditor previous to the vesting order, when the sale then becomes an ordinary forced sale, assignees must sell.

In principle, therefore, those sales are rather forced sales:

On the other hand they are not carried on with all the formalities required for forced sales; the judicial process set in motion is more like that which is required for voluntary than forced sales.

If the question, therefore, was to be decided on this one ground, it would offer very great difficulties; we think it is best solved by placing it on the ground on which we have dealt with it.

It is perfectly plain, however, that the object of our Colonial Legislature has been to render the judicial process for the sale of real Estates, after Bankruptcy or "Cessio Bonorum," more summary and more cheap than other sales; the Amendment, Ordinance No. 14 of 1864, shows this; the Transcription ordinance No. 33 of 1863, Sect. 15, also shows this; for altho' we fully agree with Mr. Naz, that this Ordinance had a special object, and that we cannot by implication extend its provisions to the matter before us, still, it shows the very strong animus of the Legislature, which by this Ordinance enacted that sales after Bankruptcy or "Cessio Bonorum" dispensed purchasers from clearing occult legal hypothecs, not inscribed hypothecs which our law cherised and favoured beyond all others.

Having, therefore, come to the conclusions that the purchaser of real Estate sold by assignees of a bankrupt or insolvent estate, is not bound to fulfil the formalities for a "fixation de prix" at the instance of one who is only the creditor of the bankrupt or insolvent; but that he is bound to do so at the instance of a creditor holding on the real Estate a hypothec anterior to the bankrupt or insolvent's seizin, it only remains to consider on what position the Defendant appears before us.

He does not hold a hypothec on or against the former proprietors; he was a personal creditor of the insolvents, the holder of a note or notes on which he recovered judgment, and inscribed a general judicial hypothec; his claim is connected with the insolvents, with them alone; there is more, he, of all others, must not plead ignorance of the sale effected publicly at the Master's Bar, of his Estate "Belle Vue"; for he tried to sell it himself, but as he had not seized it previous to the vesting order, the Court ordered that the assignees should sell, and ordered it by a Judgment to which he was a party.

Legally, the Defendant has no right to call upon the Plaintiff to 'fix his price," and though this be not necessary, still, we find that the equity of the case entirely coincides with the law which, in our opinion, ought to settle and determine it.

Judgment for Plaintiff; costs to be costs of Order.

COURT OF BANKRUPTCY.

FAILLITE,—LIVRES,—CERTIFICAT.

BANKRUPTCY,—BOOK KEEPING,—CERTIFICATE.

In Re:

Bankruptcy TONNET.

P. L. CHASTELLIER,—Of Counsel for Bankrupt.
N. SICARD, —Bankrupt's Attorney.
A. LEGALL, —Of Counsel for Assignees
P. E. DE CHAZAL, —Attorney for the same.

14*th August*, 1867.

On the second of October last, the Bankrupt

filed a Declaration of Insolvency at the Registry of this Court, and on the same day was adjudicated a Bankrupt at the instance of Louis Féréole Serret.

The trade Assignees were of opinion that the Bankrupt's conduct, and the unsatisfactory manner in which he had appeared before the Court and explained his dealings, as a trader, could not allow them to suffer him to pass through the Court unopposed, and after an examination which led to several adjournments, at their request, in order that witnesses should be called, as new facts were elicited which required inquiry and explanation, the Certificate Sitting was appointed, when the Assignees, by A. LEGALL, strongly opposed the Certificate applied for by the Bankrupt who was supported by P. L. CHASTELLIER.

The points touched upon in the argument on both sides, involving mere questions of fact, are dealt with in the Judgment of the Court.

JUDGMENT.

The Bankrupt, it appears, was a linen draper, and had been also, at one time, a partner in the grocery business of Tonnet and Kéblé; he had sold his share in the latter concern, and his liabilities arose from the linen drapery business which he entered into, in 1851, and appears to have carried on, uninterruptedly, up to the time of his failure.

I am not at all satisfied with the books produced by the bankrupt; it is evident that be they what they may, they ceased to be kept for some time before his bankruptcy, with even the semblance of regularity which they disclose previous to the change totally unaccounted for by the bankrupt.

There is no Journal, an essential Book; there is, it is true, a book of sales which was argued to amount to a Journal, but that Book is very suspicious. The Bankrupt's previous mode of keeping that sales Book was to enter item by item the sales he effected;—but sometime before bankruptcy a new way of book-keeping is set in motion, and we find, merely, entries at different intervals, one entry extending over a week sometimes, and to this effect: "for ready money sales, so much." There is nothing else, and if this be the Journal, how is it possible to test by such entries alone whether goods and what goods have really been sold, and at what price they have been disposed of by the Bankrupt?

This is very important, for, I find that a very short time before the Bankrupt filed his own Declaration of Insolvency he had made extensive purchases of goods of "Wilson, Swale & Co." and other merchants, and he does not account, nor can his books help the Court to find a correct account for what he has done with the goods.

It is very true that when a bankruptcy takes place those creditors who have been the last to lend money or sell goods, are generally the losers, and this may take place without any fraudulent intent on the part of the Bankrupt; but here, I find the Bankrupt keeping his books in a particular way, for several years, and then altering, for no convenable reason, that original and clearer mode of book-keeping for another which if it can be called "Journal" keeping at all, is calculated to throw confusion and obscurity on all his transactions.

I find him buying goods for a large sum of money; and when a creditor, Mr. Galdemar, to whom he had applied for a renewal of a bill, on account he said of having been compelled to pay for one Duval, asked him if this would not compel him to give up his business, the Bankrupt laughed at Mr. Galdemar, talking very big about his stock-in-trade and other property. Mr. Wilson's evidence, also, is important on this point. I found that the Bankrupt did not lose money by any speculation which, however, foolishly conceived or unwisely carried on, was, at least, a *Bona fide* one.

I find that he had no real property from which whether in the shape of produce or rent, he could expect to meet the liabilities he incurred so shortly before he took steps to have himself made a Bankrupt; and not only does the Bankruptcy Amendment Ordinance No. 14 of 1864, now authorize the Commissioner to punish the Bankrupt for contracting debts without some reasonable expectation of paying them, and the Bankrupt's liabilities are posterior to and therefore come within the provisions of the Ordinance, but I find that he cannot satisfactorily account for those goods. It should be added that the Bankrupt's business, in connection with Kéblé, had so far, as the Court can trace it, been successful, for, he appears to withdraw money from it, and when he sold his share he received, he says, the whole sale price; his book so far as he could point the transaction out, show that part, at least, of the money was paid to him.

In fact the latter part of the Cash-book is evidently prepared, to say the least of it, without reference to any Journal; for, (in order to make up and balance that book) we find a sweeping entry, the last, of £210 and odd cents for provisions and expenses; what they were and whence the framer of the cash-book got his information, it is impossible to guess.

It was argued that these and similar other facts might be omissions, this may be; but, then, this should be shewn to be omission and the law wisely compels a trader to keep books. A "Journal" is essentially required, not only to allow the Bankrupt to explain his dealings, but also to allow the Creditors to follow such dealings in their course and see for themselves what has become of their money or their goods.

Now, here, if there have been omissions, I am of opinion that they have been wilful omissions. The Bankrupt himself says: "I often borrowed "money without entering the same in my books "in the hope of returning the sum immediate-"ly"—Again: "After looking at my books, I "do not recollect wether I made any entry of "sums lent to me by Boulloux."

Now, Boulloux appears as a large creditor holding a hypothec on the Bankrupt's house; he

said he had lent money to Bankrupt and so the Bankrupt says; but if such borrowed money do not appear on the books, sometimes an entry is made and sometimes not, how is it possible to test whether Boulloux was a creditor, at the time it is said he was, or not; and that claim of Boulloux,it is evident, was viewed with great suspicion by the Assignees.

There is nothing, before the Court, calling upon me to give an opinion as to whether the Assignees ought to challenge that claim before the Supreme Court; they must use their own discretion as to that; but there is enough to show that the Bankrupt's Books are not to be trusted to throw light upon his dealings and transactions, since, on his own admission, it is evident that important entries that should appear in such books, are not to be found there.

This circumstance assumes a very important feature, when I come to consider the mode in which the Bankrupt came before this Court, and I must say that I am not at all satisfied with either his explanations or the evidence of the witnesses called to throw light on those explanations.

The Bankrupt filed his Declaration of Insolvency; on the same day Féréole Serret applies for an Adjudication of Bankruptcy in virtue of a note which he held. Now, how did Serret become the holder of the note? The Bankrupt says that he wanted money and that he applied to his friend H. Durand who discounted Bankrupt's note of $271 at 12 o/o. Durand gives no check but hard cash for the note; that money so received does not appear in Bankrupt's cash-book. The transaction does not appear in Durand's books, for, Durand has a partner and this, he says, was a private transaction. But strange to say, Durand who, out of his private funds, finds $271, hard cash, to give to Bankrupt, find himself, four hours afterwards, in want of money, and Serret appears in the field to discount the note from Durand, at the same rate; Durand giving his endorsement, Serret, an attorney's clerk, also gives hard cash. It is peculiar that in both transactions, on that same day, money always passes from hand to hand, no cheques, no discount note, no entry. The note is made payable on the 31st August; on that day Tonnet was not a Bankrupt, and the note was endorsed by Durand, a trader now carrying on business and able to find, out his private means, quite irrespective of his co-partner's funds, money to oblige a friend.

The note is not protested, Durand's endorsement is lost, his signature is not guaranteed and Serret takes no step, even against Tonnet who is said not to be his friend, until he applies for a a Fiat of adjudication, on the 2nd October, the very day that Tonnet, to make matters run more smoothly, had, himself, field his Declaration of Insolvency.

Now, all this may be true,but is very improbable; and it is very difficult for me to dispel the very strong impression, on my mind, that the note was given to Serret, in order that Serret should make Tonnet a Bankrupt and help him, should he be able to obtain a certificate, to evade the unpleasant consequences, as to Tonnet's personal liberty, of the legal proceedings instituted against him.

In coming to the conclusion to which the features of this case have brought me, I have not allowed that last case fought, as it is, with suspicion, to have more weight on my mind that it should have; for, altho' I believe the whole story improbable, I have not sufficient evidence to believe it to be absolutely false, but there is enough on it, when coupled with the other facts of the case, there is enough in the mode in which the Bankrupt has traded, his wilful omissions from his books, the fact that very important transactions, like those with Boulloux, cannot be traced in these books as they ought to be; the change in the *modus operandi* from comparative clearness in what the Bankrupt calls his "Journal;" but it really is not a "Journal" so positive, and I am afraid I must say intended obscurity; in the way in which he obtained goods from some of his creditors, so shortly before he failed, taking these goods and leaving them, and the Court ignorant of his transactions, showing neither losses by speculations or otherwise, nor the slightest expectation of obtaining, from other legitimate sources, the means of discharging liabilities which his trade alone could not meet. (facts which as stated above are now punishable by the Ordinance No. 14 of 1864.)

There is enough, I repeat, in all these facts to induce the Court to support the opposition offered by the Assignees and not to grant to the Bankrupt his certificate.

I am of opinion that the certificate must, now, be refused and protection withdrawn.

The Bankrupt may, after the delay of three years, apply again to the Court, for his certificate.

SUPREME COURT.

SÉQUESTRE.

La Cour Suprême n'a point qualité, en l'absence du consentement de tous les créanciers du saisi, pour prolonger le séquestre judiciaire de la propriété saisie, au-delà du temps strictement nécessaire pour l'accomplissement des formalités requises en matière d'expropriation forcée.

Elle n'a pas d'avantage qualité, en l'absence du même consentement, pour accorder un privilège à celui qui fera des réparations aux usines de la propriété saisie.

SEQUESTRATION.

The Supreme Court has no power, without the consent of all interested parties,to extend the judicial sequestration of an Immovable property under seizure, beyond the reasonable limits of the proceedings in forcible ejectment.

The Court has no more power, except with the same consent, to order that a privilege should be given for money spent in repairs of machinery.

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In Re:

Sequestration of the Estate FONTENELLE

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Before:

His Honor the Acting CHIEF JUDGE and
The Honorable Mr. JUSTICE ARNAUD.

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29*th August* 1867.

This is an application to continue the Judicial Sequestration of an Estate, the sale of which is prosecuted by way of "Saisie immobilière," and to authorize the payment, by privilege, of a sum to be spent for repairing the machinery of the same.

That application made by the levying creditor is consented to by all the other creditors except one, namely by the firm of "Elias, Mallac & Co.:"

This Estate was placed under Sequestration on the 14th of May last and the order of the Court has been that the Estate be placed under judicial Sequestration pending the proceedings in levy.

These proceedings have very nearly come to an end, and the Estate has been put up for sale, but has not been sold.

Reasons have been given, at the Bar, in order to account for the Estate not having been sold, it has been said that an "Ordre" of the previous price of adjudication was being framed and that the fear of possible legal consequences arising out of the delivery of the "bordereaux" deterred purchasers from coming forward, before the closing of the "Ordre." Such argument we mention simply to notice that, assuming we had the power, in law, to continue such a sequestration, it would be impossible for us to assign to it a limit consistent with the nature of those considerations.

But we hold that such questions must be decided in principle and not upon the weight of reasons peculiar to each individual case, they involve a power of interference by the Court with the rights belonging to the parties before the Court, and such power we are not at liberty to extend beyond the limits defined by law.

It has been contended that the majority ought to bind the minority and that the Court could take what steps they think best in the interest of the creditors. It may be so in a general point of view, and there are cases under the application of special laws, such as our law of Bankruptcy, where we are empowered, under certain defined limits, to restrain creditors in the exercise of their acquired rights for the common benefit; but in the absence of any such special authority, we are of opinion that we have no power to interfere with the rights of creditors, without the consent of all interested parties.

Specially, we are not at liberty, in a case of sequestration incidental to a "Saisie Immobilière," where the law empowers the Court to take steps pending the proceeding *ad rem conservandam*, to order, unless with the consent of all, that a privilege should be given for money spent in repairs of machinery, and for expenses of management, during a period extending beyond the reasonable limits of the "Saisie Immobilière." It may be the interest of a creditor who, by law or contract, possesses a claim of certain rank, to consent to allow a preferable claim to come in before him; but if he chooses to view the matter in a different light, we have no power to compel him to accept such a modification of his rights, unless it be to the extent of costs indispensable for preserving the common pledge until realized by sale in due course of law.

In this matter we find that the sequestration is given until the proceedings in "Saisie Immobilière" are brought to an end; and the Estate not having been sold, we must take into consideration that some time is necessary in order to give the usual notices precedent to a public sale. We grant one month time, that is until the 1st of October next, within which time we order the Estate to be sold for whatever it may fetch; and in the mean time we grant a continuation of the sequestration already existing, under the same conditions, and which will not extend beyond the 1st of October.

Costs to be Costs of Sequestration.

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SUPREME COURT.

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INDIVISION,—LICITATION,—VENTE D'UNE PART INDIVISE,—ARTS. 882-883-1166 ET 2205 DU CODE CIVIL.

Le créancier d'un co-héritier ne peut saisir la part de ce co-héritier avant la réalisation du partage ou de la licitation; il peut intervenir au partage ou demander la licitation des biens dont son débiteur est co-propriétaire.

La vente faite, par le débiteur, de sa part dans la succession, postérieurement à la demande en licitation signifiée à la requête de son créancier, ne peut arrêter la licitation; cette demande ayant produit, quant aux droits du débiteur sur l'immeuble, l'effet d'une saisie-arrêt.

Les articles 882-883 *et* 2205 *ne sont pas applicables aux co-héritiers, seulement, mais s'étendent à tous les communistes.*

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UNDIVIDED PROPERTY,—LICITATION,—SALE OF AN UNDIVIDED SHARE,—ARTS. 882-883-1166 AND 2205 OF THE CIVIL CODE.

The creditor of a co-heir cannot seize that co-heir's share of the estate before partition or licitation. He may set in motion the judicial process for licitation or intervene in the partition.

A sale, by the debtor, and subsequent to the application for licitation, cannot defeat the creditor's right to licitation, the procedure for licitation having the force of an attachment.

***Articles** 882-883 and 2,205, are not limited to co-heirs but apply to all communists.*

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ELIAS, MALLAC & Co.,—Plaintiffs,

versus

ET. PREAUDET & ANOR—Defendants.

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Before:

His Honor the Acting CHIEF JUDGE and The Honorable Mr. JUSTICE COLIN.

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J. COLIN, —Of Counsel for Plaintiffs.
A. J. COLIN, —Plaintiffs' Attorney.
HON. H. KŒNIG,—Of Counsel for Defendants.
J. PIGNEGUY, —Attorney for E. Préaudet.
V. BOULLÉ, —Attorney for Adler.

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3rd September 1867.

On the 11th of June 1867, the Plaintiffs exercising the rights of Ferdinand Adler, their debtor,—applied for the sale by Licitation of a plot of ground with the buildings erected thereon, and commonly known under the name of the *East India Dock*, the said Dock belonging jointly to Ferdinand Adler and Ernest Préaudet, the Defendants, who had purchased the same at the Bar of the Master of this Court, on the 28th December 1865.

The Plaintiffs' application, made in Chambers was more than once adjourned by consent, and finally objected to by Préaudet, on the ground, as the parties all admitted, that as creditor holding a writ he intended to apply for the resale by "Folle Enchère" of the one moiety of the said Dock belonging to Ferdinand Adler, a step which Ferdinand Adler, as it appears from a notice under his attorney's hand, intended to oppose.

The matter was referred to the Court by the Judge in Chambers and ordered by him to be heard on the first day of the following term. After the order of reference to the Court, bearing date first July 1867, Préaudet bought from Ferdinand Adler, his share, to wit, one moiety in the said Dock. No notice of the conveyance appears to have been given to the Plaintiffs who had applied for the sale by Licitation and who, upon the objection of Préaudet, had been referred from Chambers to the Supreme Court.

When the case came on for hearing, this term, the Plaintiffs made their application, as exercising their debtor's rights, to have the joint property sold by Licitation.

Ferdinand Adler said nothing save that he was ready to abide by decision of the Court.

E. Préaudet objected, no longer, setting forth his intended sale by "Folle Enchère," but rested his opposition on the ground that he had now bought the share which belonged to Ferdinand Adler and that the Plaintiffs were now deprived of the power of selling by Licitation.

J. COLIN, for the Plaintiffs, laid the facts above recited before the Court, and insisted, on the strength of Arts. 1,166,882 and 2,205 of the Code, that he had a right to licitate notwithstanding a sale made by his debtor after his application for a Licitation, which application operated in law as an attachment.

He cited Larombière—p. 740. do. p. 288.
Court of Aix. S. V. 32. 2.600.

Hon. H. KŒNIG, for Defendants, argued that the power to sell was not taken from Adler by the fact of his creditor's application for a sale of the Estate, by Licitation. In cases of succession the Plaintiffs might be right, not so in cases of ordinary co-proprietors or community. There is, here, no seizure and no-fraud. The authorities cited on the other side from Larombière is quite restricted *vide* p : 700 par. 32 also Court of Bordeaux S. V. 49, 2, 97.

JUDGMENT.

Messieurs Elias Mallac & Co, creditors of Ferdinand Adler have, in virtue of Art. 1,966 of the Code, exercised their debtor's rights and applied for the sale by Licitation of the East India Dock, buildings and appurtenances, belonging undividedly to Ferdinand Adler for one moiety and to Ernest Préaudet for the other moiety.

At the time they made their application, Ferdinand Adler was the owner of the one moiety of the joint estate, and had not conveyed his rights of ownership to any one.

Ferdinand Adler might, therefore, undoubtedly on that day, have applied for the sale by licitation of the said property, as nothing appears in evidence that could have hindered the execution of his right as a joint or co-owner to cause the indivision to cease.

It follows again, that if the right to apply for the sale by Licitation of a debtor's property held jointly by that debtor and a third party, be one of the rights which a creditor can exercise, Elias Mallac & Co. were fully entitled to make the application which is now objected to by Ernest Préaudet.

It is to be observed that the application first came before a Judge in Chambers; Ernest Préaudet seems, from the statement of Counsel admitted on all sides, to have objected to it, not on the ground on which rests the objection set up before the Court, that is, of a conveyance by Adler of his joint moiety to him, Préaudet,

owner of the other moiety, but on the ground that Préaudet, holder of a warrant for payment, intended to apply for a sale by "Folle Enchère" of Adler's moiety, an intention which Adler formally declared by a Notice under date, first June 1867, he would challenge.

Be Préaudet's right to apply for a "Folle Enchère" what it may, and be Adler's right to oppose the delivery of the Master's certificate in view of such "Folle Enchère" what it may, that question did not arise, has not been argued, and does not touch the issue raised before us.

The real objection of Préaudet arises from a fact which took place after the Judge in Chambers had referred the matter to the Court; that fact is an alleged conveyance from Adler to Préaudet of Adler's moiety of the property in question.

He takes broadly his position on this ground, that although Elias Mallac & Co. had applied for the Licitation before the conveyance to him by Adler, there was nothing to prevent Adler selling, and Adler having sold, Elias, Mallac & Co, are now unable to exercise their debtor's rights which have disappeared.

The first question that arises is this: Is the right of Licitation which Adler undoubtedly had, one of the rights which his creditors can exercise in terms of Art. 1,066?

A creditor may seize his debtor's property, he may attach his debtor's property, *à priori* where would be the reason if his debtor has an interest in a joint estate, of depriving him of securing, on his behalf, that joint interest? But he may not seize his debtor's undivided share before a Licitation or Partition, does it not follow, unless there be some text of law which militates against the exercise of that right, that the creditor may cause the Licitation to take place, in order that the indivision should cease, and that when his debtor's property has been publicly sold at the Bar of the Master of this Court, he may, if no better right or privilege takes priority over his claim, obtain payment out of his debtor's share of the purchase price?

Art. 2,205 of the Code, whilst enacting the prohibition to seize the undivided share of the co-heir, previous to Partition or Licitation which is the Partition not of whole Estates but of the special proedium sold, enacts also that such Partition or Licitation may be called for by the creditor "avant le Partage ou la Licitation qu'ils peuvent provoquer, s'ils le jugent convenable, ou dans lesquels ils ont droit d'intervenir conformément à l'Art. 882—au titre des Successions."

The Article gives two rights: 1o. To cause the Partition or Licitation to take place; that is absolute; 2o. To intervene when they take place at the instance of others, whenever they are placed within the conditions which the law of Successions requires for their intervention.

It is right not to lose sight of that double right, because it clears away the difficulties, which, however, are pretty well settled now, which once made it a *vexata questio* whether Arts. 882, 883 applied to other co-owners besides co-heirs, *i. e.* co-owners of the Estate that has come down to them jointly, by succession.

The text of Art. 2,205 would seem to place the right of Elias, Mallac & Co. beyond all doubt; but it was argued that even if they could apply for the Licitation, that did not prevent Adler, their debtor, from selling to Préaudet, even after they had put into operation the judicial process of Licitation.

Now, would it not be strange, and in fact, would not the creditor's right be perfectly illusory, if after he has used that right, it can be coolly defeated by his debtor's conveyance of his interest in a property which has been previously secured by judicial process on behalf of his creditor. If the creditor had seized, (and we have seen that the Licitation, not the seizure, is the remedy when the debtor's rights are rights jointly held with another person) the debtor could not sell after denunciation; if the property were personal property and could be attached, the debtor could not sell after attachment; here, practically, the sole legal remedy is the Licitation; and can this action taken before any estoppel could be set forth, be frustrated by his debtor's conveyance in spite of judicial process, in spite of the quasi-attachment which such judicial process has laid upon the debtor's property?

If this were the law, it must be applied; but we are of opinion that this is not the law.

It is perfectly clear that if Adler had conveyed to Préaudet, before the application for a Licitation, Elias, Mallac & Co. would have had no rights of their debtor's to exercise; the rights would have been legally transferred to another, and Elias, Mallac & Co., would be barred or estopped by all and singular the facts or the law which could estop or bar their debtor himself; they hold and exercise such rights as he has, and no more; they hold and exercise such rights he could have held and exercised then, and no more.

But here, Adler had not sold, might have applied for the Licitation on the day that Elias, Mallac & Co., did apply for it, and therefore his rights are no longer entire in the debtor's hands: the debtor is still the owner, but his ownership is shackled with this judicial lien which grasps and has becomes as it were, inherent in it, and cannot be shaken off, by the fact such debtor has, without notice to his attaching creditor, out of his presence and without his consent, parted with the property.

But there is more, if Elias, Mallac & Co., had on the day they set in motion the judicial machinery for the licitation, and done so, let it be remembered in presence of both Ferdinand Adler and Préaudet himself, if they then exercised the rights of their debtor? and they did, how can such rights be exercised one way by the creditor, and another way by the debtor, so that whilst the creditor was carrying on the exercise of those rights, the debtor would give up the very identical rights. Would not the result be con-

fusion and a mockery ? and is not the plain interpretation of the article 2,205 this : that when the creditor has, whilst nothing yet estopped him, begun to exercise his debtor's rights, he is not exactly substituted to the debtor, in as much as the debtor is made a party to the proceedings; but he is substituted to the debtor, so far, that the debtor cannot defeat the exercise of his rights by such creditor by posterior acts incompatible with such exercise ?

The authorities are,we think, quite clear on the point which has been decided as we view it,by the Court of Aix, S. V. 32.2.600 *Gonet* v *Porte* also by the Court of Orleans, in *Courtois* v *Pelissé Avoué* which, on the 29th May 1845, ruled *inter alia* that : " Considérant qu'une opposition à partage a pour objet de frapper d'indisponibilité, au profit des créanciers opposants, toutes les valeurs de la succession, qu'une demande en partage de la succession, elle-même, intentée par les créanciers d'un héritier, doit nécessairement produire le même résultat, qu'en effet elle revèle aussi clairement, et plus clairement encore qu'une opposition, les prétentions du créancier sur la part revenant à un débiteur ; elle l'a mise de même que l'opposition sous la main de la Justice, de telle sorte qu'elle ne peut plus être par lui cédée, transportée, ou donnée en gage, hors la présence et le consentement du créancier poursuivant ; que s'il en était autrement, la demande en partage quoique formellement permise à celui-ci du chef de son débiteur, deviendrait pour lui un droit sans utilité &a, &a. "

That decision was, on appeal to the Court of Cassation, affirmed.—S. V. 46,1.444 on the ground that : " L'intervention du débiteur dans un partage, aux termes de l'Art. 882 C C, constitue, de la part de ce créancier, un exercice de ses droits propres sur la portion de biens que le partage doit attribuer à son débiteur ; que cette portion de biens se trouve ainsi placée sous la main de la Justice et que dès lors le débiteur ne peut plus le donner en gage à un autre de ses créanciers, au préjudice des droits du créancier intervenant.

Against this series of Decisions, one case alone was cited, that of the Court of Bordeaux, 29th June 1848, which, besides being strongly and ably criticised by CHAUVEAU sur CARRÉ, cannot outweigh the authority of the Courts of Aix and Orleans supported by the supreme decision of the Court of Cassation.

It is said however that Art. 2,205, as also Art. 882 to which it indirectly refers for the second of the two remedies enacted on behalf of creditors, applies only to co-heirs not to co-proprietors or other communists.

That question was certainly at one time, a *vexata questio*, but has been decided in this Court and is now generally held to be solved in the sense of the larger and, on reality practical application of the article, and the doctrine that a creditor can, in virtue of Arts, 1,066, 882, 2,205, intervene in or set in motion the Partition or Licitation of the joint property of his debtor, applies to the creditor of a co-heir or of any other co-proprietor of rights.

What is a co-heir in relation to a Partition or Licitation, but a co-proprietor of a certain Estate which has to be decided between himself and others holding joint rights in the same Estate ?

What is a co-owner under the same circumstances but a co-proprietor of a certain Estate to be divided between himself and other co-owners ? both are in the same position, except that the former holds by succession, the latter by purchase or some other equally valid title ; and there is nothing in the law, which if the rights of the co-heirs or co-proprietors are once admitted to be good, draws a distinction between the rights of the one and rights of the other so far at least, and this is sufficient for the purpose, as the subsequent joint holding or subsequent partition goes ; why then should a right given to the creditor of the co-proprietor as coheir and not taken away from the co-proprietor as joint purchaser, be withdrawn from the latter ?

The creditor of the co-heir may not seize before Partition or Licitation the co-heir's share of the joint Estate ; (2,205) can the creditor of the co-proprietor seize the co-proprietor's share of the joint Estate ? assuredly not ; the Court of Cassation which, at first, in 1819, had decided that such seizure might be effected provided the Partition were made before adjudication has now clearly held, and various Decisions have adopted the same doctrine which is taught by various learned commentators as CARRÉ p. 407 SS. II—PIGEAU-2-p. 211, DALLOZ 11, p. 668. No. 7, that the seizure of the joint Estate of the debtor could not be seized before Licitation whether the debtor be a co-heir, any other communist or joint holder. Of the many Decisions in support of the rule, it is sufficient to cite that of the Cour de Cassation, of the 31st December 1856. (DALLOZ 1857 1.220) *Chenier* v *Lourset.*

If this be the case and if like the co-heir any other joint holder may not seize before Licitation, like the co-heir he must force Licitation or he is left at the mercy of the joint owners. He has no remedy ; this simple reason would be sufficient to show that all co-proprietors are so far liable to the exercise of their creditor's rights. But after all what reason could there be found to hold that article 883 applies to all co-owners as well as co-heirs (and this is now hardly disputed) and to reject the wider and more just interpretation of the law, when articles 882 and 2,205 come into operation ? and yet articles 882 and 2,205, are protective of creditor's rights, whilst article 883 enacts a legal fiction whereby each co-heir is held to have succeeded alone and immediately to that part of the Estate which falls to his lot upon a Partition, the result being that if a particular proedium is bought by one of the co-heirs, the hypothecs registered against any other co-heir upon such prœdium are held no longer to burden it ; an important law which would be extended to all co-owners whilst the remedial measures enacted by articles 882 (1st part) and 2,205 would, for no conceivable distinction, be thus restricted within the narrower limits.

What would then the position, in this cause, of the Plaintiffs be ? By Art. 2,205 they could not seize ; if they cannot licitate when nothing es-

topped their exercise of their debtor's right, when they first set it in motion, if in fact a subsequent sale is to check them, the result will be this, either they are hypothec creditors or they are not; if they are not, they cannot outbid upon the "*fixation de prix*," if they are, they run very great danger, to say the least of it, to see by the operation of Art. 883, (the co-owner Adler's share having been sold to the co-owner Préaudet), their hypothec swept away; and this when the sale was not only effected after the Plaintiffs had, by their judicial process, quasi attached the property, but had done so in presence of both, Adler and Préaudet.

The result must be that Art, 2,205 which has been held to prevent the creditor of any co-owner or the creditor of a co-heir to seize before Licitation, must also properly be held to allow the creditor of any co-owner or the creditor of a co-heir to cause the Licitation or Partition to take place, and this Elias, Mallac & Co., have done when Adler had still the power to do so and had not yet divested himself of any of his rights which, therefore, could still be attached. It follows, also, that the operation of art. 2,205, cannot here be defeated by a sale subsequent to the application for Licitation by the creditor of one of the co-owners, and that such subsequent sale having taken place after the property in question had been placed "sous la main de la Justice" by the process above described, is without force against the Plaintiffs.

We, therefore, order the Licitation of the plot of ground and buildings known under the name of *East India Dock* to be carried on at the instance of Elias, Mallac & Co.

The costs of this instance up to this day shall be paid to Plaintiff's by Préaudet.

Adler shall neither pay nor receive costs.

SUPREME COURT.

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NOVATION,—COMPTE COURANT, — OUVERTURE DE CRÉDIT,—APPEL D'UN JUGEMENT DU MASTER.

Il n'y a point novation lorsqu'une ouverture de Crédit faite à des co-propriétaires, pour un temps déterminé, est continuée pendant ce même temps avec l'un de ces derniers seulement, en réservant tous les droits et actions stipulés dans le premier Acte; en pareil cas l'hypothèque accordée sur la propriété par tous les co-propriétaires, lors de l'ouverture de Crédit, conserve son rang pour le montant de toute balance restant due à l'expiration de l'ouverture de Crédit.

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NOVATION,—ACCOUNT CURRENT,—OPENING OF CRÉDIT,—APPEAL FROM A JUDGMENT OE THE MASTER.

Where a Credit was opened to several co-owners for a certain limited period, and afterwards, in the course of such period continued with one of them only, who had purchased the share of his partners, and with the reservation of all rights and actions stipulated in the first deed, the Court ruled that no novation had taken place, and that the mortgage security granted on the Estate by all the co-owners, would remain in full force and secure the payment of any balance remaining due by the Estate at the expiration of the opening of Credit.

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LETELLIER,—Appellant,

versus

THE CEYLON COMPANY,—Respondent.

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Before:

His Honor the CHIEF JUDGE and
The Honorable Mr. JUSTICE ARNAUD.

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E. J. LECLÉZIO,—Of Counsel for Appellant.
V. BOULLÉ, —Appellant's Attorney.
HON. V. NAZ, —Of Counsel for Respondent.
W. HEWETSON, —Respondent's Attorney.

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24*th September* 1867.

This is an appeal from a preliminary Order and from a final Decision of the Master, of the 13th April and 13th May last respectively, given and made in the "Ordre" of the *Trois Cascades*, on the following grounds:

1o. That such Order or Judgment are bad in law.

2o. For having decided, by anticipation, that the production of the books of the Respondent was useless.

3o. For having overruled the plea of novation set up by the Appellant.

4o. For misconstruction of the deed of sale to Adrien Faduilhe by Laurent Faduilhe of the latter's share in the *Trois Cascades*.

5o. Because the contract between the Ceylon Company and Adrien Faduilhe is not binding on the Appellant, who is the Assignee of Laurent Faduilhe.

The Appellant criticised the Master's Order, refusing the production of the Respondent's books as useless though having recognised the right of Letellier to inspect the books of the Ceylon Company. After such recognition, the Master, it was contended, was bound to order the production of those books without anticipating the use intended to be made of them on their being produced. We concur with the Master in recognising the utter uselessness of the production of the books, the Respondent having put the Appellant in possession of the evidence he was desirous to obtain from an inspection of their books. The Appellant's object was: 1o. to

prove the existence of one single account begun with Laurent and Adrien Faduilhe and continued with Adrien Faduilhe alone, after the sale made to the latter by the former of his fourth share in the *Trois Cascades* estate,and thence, 2o. to argue novation on the part of the Ceylon Company.

The production, at the " Ordre", of an account current duly signed by Arbuthnot, late Manager of the Ceylon Company, from the 11th December 1863 to the 28th February 1866, showing only one balance in favor of the Company, clearly established the existence of one single account; the Appellant was thus supplied with the means of supporting his plea of novation. Under such circumstances the production of the books called for would have been superfluous, and the Master was fully warranted in refusing an application which, if allowed, must have needlessly retarded the final closing of the Ordre of Distribution.

So much in justification of the interlocutory Order complained of and which is hereby affirmed by the Court.

We now turn our attention to the plea of novation set up and overruled by the Master. In support of this plea it has been said that the Applicant stands in the right of Laurent Faduilhe who, on selling to Adrien Faduilhe his share in the *Trois Cascades* Estate, on the 16th January 1865, had assigned part of his sale price to Letellier, the Appellant. That the Ceylon Company, after the sale of Laurent Faduilhe to Adrien Faduilhe, had continued their dealings with Adrien Faduilhe alone, without having previously closed their accounts with Laurent and Adrien Faduilhe and struck the balance then due by them to the Company, thus, clearly intimating their intention of looking to Adrien Faduilhe alone for payment of the sums due by Laurent and Adrien Faduilhe.

In assuming the fact which is not disputed, of the Company having dealt with Adrien Faduilhe alone, after the sale to him by Laurent Faduilhe, that is, on and from the 15th March 1865, how can such dealing affect the contract between Laurent and Adrien Faduilhe and the Ceylon Company, of the 10th December 1863 ?

In their contract with Laurent and Adrien Faduilhe, we find that the two proprietors of the Estate *Trois Cascades* mortgaged their joint property to the amount of $30,000 as a security for any balance of account which might be due to the Ceylon Company by Laurent & Adrien Faduilhe at the expiration of the Credit opened to them.

In the deed of sale of Laurent to Adrien Faduilhe, of the 16th January 1865, we read : " la " présente vente est faite aux charges suivantes " que M. Ad. Faduilhe s'oblige d'exécuter,savoir : " 1o. D'exécuter aussi toutes les obligations pri- " ses (par le vendeur) avec la société le " Ceylon " Company Limited ", relativement à l'affaire " d'entre Coupe faite avec cette société pour la " propriété *Les Trois Cascades*, le 10 Décembre " 1863, par suite de laquelle affaire d'entre Coupe " MM. Ad. & L.Faduilhe resteront débiteurs en- " vers la dite société d'une somme d'environ " $6,000. "

" What is conveyed to Letellier by Laurent Faduilhe by the sale under private signatures duly registered of the 1st May 1866 ? the sum of £12,000 being the " solde " (balance) of his late price to Adrien Faduilhe ; theconditions of which sale cannot be ignored by Letellier,the Appellant, who produces in support of his claim the deed of sale by Laurent Faduilhe to Adrien Faduilhe and mentioning the mortgage in favor of the Respondent."

The contract of the 17th March 1865, between the Ceylon Company and Adrien Faduilhe alone, after the co-partnership between Laurent and Adrien Faduilhe had ceased, far from betraying any intention on the part of the Ceylon Company to discharge Laurent Faduilhe then sole owner of the *Trois Cascades* as sole liable for the payment of the sums due by Laurent and Adrien Faduilhe shews the very reverse.

It is expressly stipulated, by Art. 3 of that Contract with Adrien Faduilhe, alone, that the mortgage guarantee given to the Company by the "Ouverture de Crédit" of the 10th December 1863 shall be available to the Company until payment in capital interest &c. either of the said £20,000 advanced to Adrien Faduilhe, or of any balance which might remain due to the Co.; after which comes the following clause : " Sont également maintenues, *sans novation* ni derogation aucune, toutes les clauses, conventions et stipulations contenues au dit acte d'Ouverture de Crédit."

It is true that Laurent Faduilhe is no party to that Act. But it is not the less true that, by the "Ouverture de Crédit" of 1863, Laurent Faduilhe with Adrien Faduilhe had mortgaged their respective shares of the Estate for securing payment of the sum then advanced to them ; it is not the less true that Laurent Faduilhe has left in the hands of Adrien Faduilhe a part of his sale price to be applied to the extinction of his share of the joint debt to the Company, of which fact the appellant was cognizant. Is it not self evident that Laurent Faduilhe is bound, either by himself or by his representative Adrien Faduilhe, to fulfil his engagement towards the Ceylon Company, and do not the stipulations of 1865, made with Adrien Faduilhe, then sole proprietor of the *Trois Cascades* clearly point this way, that the Company never intended to release Laurent Faduilhe from the payment of the monies advanced to him and to Adrien Faduilhe,and not to part with the mortgage on Laurent Faduilhe's share until payment of any balance standing out against the owners of the "*Trois Cascades*" Estate ?

The novation set up in this case is neither express nor can it be implied from the wording of the contracts tendered in proof thereof. If these contracts prove anything, they prove just the reverse *viz.*, the absence of any intention on the part of the Ceylon Company to introduce any changes whatever in their rights against Laurent Faduilhe and Adrien Faduilhe.

This appeal must, therefore, be and is, accordingly, dismissed with costs.

SUPREME COURT.

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OFFRES DE PAIEMENT,—SUBROGATION LEGALE, —FOLLE-ENCHÈRE,—APPEL D'UN JUGEMENT DU MASTER.

Le créancier B, qui offre de payer la créance de A qui lui est préférable et en vertu de laquelle se poursuit la vente par Folle-Enchère de l'immeuble hypothéqué à B, ne peut être forcé pour acquérir subrogation de payer en même temps une seconde créance de A sur le même immeuble, inférieure au rang à celle de B.

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REAL TENDERS,—PAYMENT,—LEGAL SUBROGATION, — FOLLE-ENCHÈRE,— APPEAL FROM A JUDGMENT OF THE MASTER.

The creditor B, who offers to pay the claim of another creditor A, who is prior in rank, and in execution of whose claim is prosecuted the sale by Folle-Enchère of the immoveable property mortgaged to B, cannot be compelled, in order to obtain subrogation in the said claim, to pay at the same time another claim of A, on the same immoveable property, but inferior in rank to that of B.

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GERMAIN,—Appellant,

versus

VICTOR & ORS.,—Respondents.

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Before

His Honor the ACTING CHIEF JUDGE, and
The Honorable Mr. JUSTICE ARNAUD.

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L. ROUILLARD,—Of Counsel for Appellant.
J. G. TESSIER, —Appellant's Attorney.
G. GUIBERT, —Of Counsel for Respondents.
F. VICTOR, —Attorney for himself.

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24*th September* 1867.

In this matter, Mr. Victor, an unpaid privileged creditor for a bill of costs on the house of one Aristide Berger, was pro-ecuting the resale by way of "Folle Enchère" of the said house. On the case being called before the Master, one Germain, a creditor of Berger by a "hypothéque" inscribed on the said house, claimed the benefit of Art. 1,251 of the Civil Code and offered to pay the preferable claim of Victor.

To this application Victor objected, claiming as a right, in law, that Germain should not only pay the privileged claim on which he sued the "Folle Enchère" but also the amount of a promissory note due by Berger for which he had no "hypotheque." The Master decided in favor of the objection of Victor.

This is an appeal of that Decision. We are of opinion that the Decision of the Master cannot be maintained.

The law which rules this matter is provided in Arts. 1,236 and 1,251 of the Civil Code; the former provides that an obligation can be paid by a ny body who has an interest to pay it; the latter provides that he who pays a preferable claim is subrogated, in that claim, "de plein droit."

Now it is a point settled in jurisprudence that the payment of a claim which is not preferable carries no subrogation.

The question, therefore, comes to be this; can Victor, who holds two claims, one which Germain has an interest to pay under Art. 1,236 and which gives h m subrogation under Art. 1,251, compel Germain to pay him another claim which he has no interest to pay, and the payment of which would give him no subrogation? That is, can he c mpel him to do that for which the two essential conditions of the law are wanting?

No particular law has been cited in support of such a system; the learned Counsel has urged two sets of considerations: first, that the interest of Victor was that the "Folle Enchère" should take place in as much as he would come, for his promissory n te, *pari passu* with Germain who would then have lost the benefit of his "hypotheque" and would come in like other chirographary creditors.

This conclusion, of itself, would suffice to lead us to doubt the soundness of Victor's position. According to our law, an hypothecary creditor is preferable to a chirographary one, and any legal conclusion which would tend to place them, without any fault, on the same footing, would thereby give an advan'age to the party who holds the less favorable to the prejudice of him who holds the more favorable position in the eye of the law; and that is inconsistent with the general principles of our hypothecary system.

The second set of consideration, urged in support of the Master's Decision, rests on the authority of two commentators, (LAROMBIÈRES, *on obligations*) and (GAUTHIER, *on Subrogations personnelles*), who give it as their opinion that the holder of two claims one prior and the other posterior can compel the holder of the intermediate claim to pay both claims in order to be subrogated to the first; and the reason is that there would be an endless circuit of actions, in as much as the paid creditor would, with his second claim, exercise, in his turn, the right of payment, and so on. Now, with all due deference to the opinion of these writers, we cannot agree with them.

In order to give rise to an endless circuit of actions, as it is called, the situation of both creditors who offer payment must be the same in every respect and not with regard to two of the claims but of all three and it is not so in the case under consideration.

Should Germain pay the first claim of Victor, he is subrogated, whilst for the second claim he gets no subrogation, and the Court has no war-

rant to compel him to pay a claim which is not preferable and which does not come under Art. 1,251; On the other hand should Victor receive payment of his first claim and offer to pay it back again on the right of the third claim the situation is different; as to him both the claims which Germain would then hold are anterior and therefore preferable; for both he gets subrogation, so that in the one case the payment of both claims would not carry subrogation into both of them, whilst in the other case the payment of both claims would carry subrogation into both of them, and we think that if it came to be necessary to stop a circuit of actions the proper remedy would not be by depriving a creditor of a clear right of payment but by ordering the payment of both claims when such payment would be consistent with art. 1,236 and 1,251 of the Code.

These two situations are different in law, and the difference lies at the root of the principle sought to be applied, that is, on the question of subrogation, a question which, in this case, may be of little importance, whilst it would be all important when the number of hypothecary creditors are inscribed for more than the value of the property hypothecated; however, the principles are the same and must carry the same application, an application which is in conformity with a Decision of the Court of Paris. (S. 57. 2. 210.)

We are, therefore, of opinion that Victor was not justified in refusing to receive payment of his privileged claim, as he did. The Judgment of the Court is, that the Decision of the Master is reversed and that the proceedings be replaced on the footing in which they were previous to the Master's Decision.

Cost against the Respondenst, from the time of the offer of payment.

SUPREME COURT.

SÉQUESTRE,—ACTION EN DOMMAGES ET INTÉRÊTS, —" DEMURRER."

Le créancier qui veut réclamer des dommages et intérêts d'un tiers qui a agi comme gardien séquestre de l'immeuble de son débiteur, ne peut faire cette réclamation en son nom et pour son compte personnel; il doit réclamer comme exerçant les droits de son débiteur et pour compte de ce dernier et de ses créanciers.

SEQUESTRATION,—ACTION IN DAMAGES,—" DEMURRER."

The creditor who wishes to claim damages fro the party appointed as sequestrator of his debtor's estate, is not entitled to sue in his own personal name and for his own account, he must claim as exercising the rights of his debtor and for the account of the latter and of his creditors.

A. BONNEFIN AND WIFE,—Plaintiffs,

versus

THE CEYLON COMPANY,—Defendant.

Before:

His Honor the CHIEF JUDGE and
The Honorable Mr. JUSTICE COLIN.

J. COLIN, —Of Counsel for Plaintiffs.
G. GUIBERT, —Plaintiffs' Attorney.
P. L. CHASTELLIER, —Of Counsel for Defendant.
W. HEWETSON, —Defendant's Attorney.

3rd September 1867.

This is an action in damages, against the Defendants, for wrongs alleged to have been caused by their mismanagement of the estate "*Alexandrie*," situate at Plaines Wilhems, pending the sequestration of the estate, the management of which had been entrusted to them.

The amount of damages claimed by the Plaintiffs is stated at $28,441.34
Costs of Declaration, service, &c. ... 30.

$28,471.34

The Defendants have demurred to the Declaration on two grounds: 1o. The Plaintiffs as creditors, whether privileged or not, of the estate "*Alexandrie*," cannot enter for their own and sole profit any action in damages in consequence of the acts alleged in the Declaration.

The action could only be entered by the Plaintiffs in the name, and as exercising the rights of their debtor Paillotte, who ought to have been made a party in the cause; and the damages, if due, cannot be demanded by or accrue to the Plaintiffs personally, but to the estate of Paillotte, now an insolvent, to be distributed according to law or paid into Court.

Before referring to the second ground of demurrer, we shall apply ourselves to the examination of this first ground, which, if sound, will relieve us from the necessity of considering the second ground of demurrer.

In support of this first ground of demurrer, CHASTELLIER, for the Defendants, argued that assuming, for the sake of argument, the truth of the several allegations of the Plaintiffs, that the damages complained of had been caused by the mismanagement of the Defendants as sequestrators of the estate "*Alexandrie*," which damages were to be made good by The Ceylon Company, yet such damages could not be claimed, as they have been by the Plaintiffs, in their personal names, whether as privileged or personal creditors of the estate.

1o. As adjudicatees, their connection with the estate began only at the very moment the estate was knocked down to them.

Their right was to claim and insist on the delivery of the estate such as it stood at the moment of the sale.

If any damages have been suffered by the estate, the Company will of course have to make good the loss to the previous owner of the Estate, but not to the purchasers who cannot lay claim to damages done to an estate which was not their property at the date of the wrong alleged, and as to whom the Company could not, by any possibility, be a wrong-doer.

2o. As creditors of Paillotte, the Plaintiffs might be fully entitled, it is true, to claim that the damages caused to the estate should be made good. But in such case they should have brought their action not in their own personal name, but in the name of the assignees of the estate Paillotte for and on behalf of themselves and of the mass of the creditors of that estate. For though the Plaintiffs have alleged themselves to be privileged, we have no evidence of their being sole privileged creditors; and if they have been bold enough to make such an allegation, yet the time has not yet arrived to verify such an assertion, the correctness of which could only be tested in presence of all the creditors of the estate at the distribution of the damages prayed for, if allowed.

3o. As principals, they had an undoubted right to call the Defendants to account for their alleged mismanagement of the estate confided to their care both by them and the other creditors of the estate; but the Defendants being the Agents not only of the Plaintiffs but of all the creditors of the estate, any account demanded should have been claimed by the creditors of the estate jointly and not severally by the Plaintiffs.

Assuming the right of action to be divisible, the necessary inference would be that the Defendants would be liable to as many accounts and actions in damages as there are creditors. A greater hardship cannot easily be imagined.

Against the soundness of the demurrer, Colin for Plaintiffs, argued that the Declaration was sufficient in law as it set forth:

1o. A sufficient cause of action.

2o. A right of action in the Plaintiffs who, as original vendors unpaid of their sale price, were entitled to sue the Defendants for the damages sustained by their estate whilst confided to their management, by them as well as by the other creditors.

The right of the other creditors to call the Defendants to account did not and could not debar the Plaintiffs from the exercise of a right of action vested in them as one of the principals of the Defendants, and more especially, in the 2nd place, as the Plaintiffs were entitled to the whole of the amount of the damages claimed.

The harshness complained of by the Defendants of being exposed to as many actions in damages as there were creditors, were judgment to be given in favor of Plaintiffs, if it were true, was a good cause, undoubtedly, for a plea of non-joinder on their part, but no ground for a demurrer.

JUDGMENT.

Assuming that a plea of non-joinder should have been resorted to by the Defendants for their better protection from a series of actions on the part of the other creditors of the estate "*Alexandrie*," yet in the absence of any allegation that they are exclusively entitled to the amount prayed for, it would be evidently as unsafe for the other creditors of the estate as for the Defendants to allow Plaintiffs' prayer. For though they may have a preference over all the creditors of the estate by reason of their alleged unsatisfied vendor's privilege, yet in the absence of those creditors interested in siting the proofs adduced in support of such preference, it is impossible that the Court should take upon itself to give in favor of the Plaintiffs the Judgment prayed for, which would be a recognition, by the Court, of a preference to which the Plaintiffs might hereafter be proved not to be entitled.

If damages be due by the sequestrator, damages are due to the owners of the estate sequestrated, or if they have failed, to their assignees or creditors, but not to one creditor exclusively, or any other creditor, unless such creditor have a clear privilege over every other.

There is no allegation in the Declaration that the Plaintiffs are in that position.

There is an allegation that they hold a privileged vendor's claim; but there are other privileges which may encumber an estate besides the vendor's, and now is it possible that we should now, when neither the owners of the estate, nor the other creditors are before us, give Judgment in favor of the Plaintiffs, so that damages which if due may go to others be now declared to be due to them alone; and that is, practically, their prayer.

If the sole point had been that Paillotte and Blanchette had not been made parties to the cause (or their assignees if they had failed,) we should have given Judgment against the demurrer. But the point ought to have been taken by a Plea in abatement for non-joinder of Paillot and Blanchette; but the Declaration goes further, and seeks to have the whole damages ordered to be paid to the Plaintiffs in the absence of even the owners of the sequestrated estate, when the Plaintiffs do not allege their *exclusive* privilege, and when the law points out many privileges which for ought we know may be preferred to theirs when the damages are to be distributed.

The action should have been entered in such a way that Paillotte and Blanchette the owners, or their assignees, if they have failed, should have been parties to it; and the damages, if any be found due, shall as an accessory to the price of the estate, be distributed, in the usual way, by the Master to the creditors legally entitled to it; and who would be legally entitled to it can only be ascertained when, as usual, the distribution by way of an "Ordre" of the estate takes place after due notice to all the creditors.

In this state of matters we are clearly of opinion that the demurrer must be allowed with costs.

But at the same time should the Plaintiffs deem it advisable to amend their Declaration by the insertion of the name or names of the assignees or trustees of Paillotte as well as their own, and to claim the payment of the damages (if any) into the hands of the assignees for distribution either by contribution or by way of an "Ordre" amongst such creditors as might be entitled to any share in the amount which might be awarded (if any), the Court is fully prepared to allow such and other amendments as may be requisite for hastening on the final decision of this case.

But, of course, this amendment will be allowed on payment of the costs incurred by the opposite party, up to this day. The opinion of the Court on the merits of the 1st ground of demurrer rendering needless the examination of the 2nd ground stated in the Book, we shall say nothing as to the worth of that 2nd ground.

SUPREME COURT.

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MANDANT ET MANDATAIRE,—BILLETS A ORDRE.

Le mandant n'est point tenu de rembourser des billets souscrits en son nom par son mandataire, lorsque la procuration ne contient pas le pouvoir de souscrire des billets ou que ce pouvoir n'a été donné que sous certaines conditions qui n'ont point été observées.

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PRINCIPAL AND AGENT,—POWER OF ATTORNEY. —PROMISSORY NOTES.

The principal is not bound to pay promissory notes subscribed in his own name by his Agent, if the latter had no authority by the power of attorney to draw promissory notes or if such authority was given under certain conditions which have not been complied with.

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BOULÉ,—Plaintiff,

versus

ARNAL & ORS.,—Defendants.

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Before:

His Honor the ACTING CHIEF JUDGE and The Honorable Mr. JUSTICE ARNAUD.

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G. GUIBERT,—Of Counsel for Plaintiff.
F. ROBERT, —Plaintiff's Attorney.
J. COLIN, —Of Counsel for Defendant.
J. J. COLIN,—Defendants' Attorney.

24th September 1867.

This is an action in payment of two promissory notes made on the twelfth January 1862, and payable in November of the same year.

These notes are signed by Th. Arnal "par procuration de Made. Ve. Ct. Arnal," and they are claimed by the Plaintiff as possessor of the same by endorsement.

The Defendants are the heirs of Widow Arnal, and they contend, in defence to this action, that under the authority given to him by their mother, Théodore Arnal had no power to bind her to the payment of these notes.

The facts are as follows: on leaving this Colony in 1856, Mr. and Mrs. Arnal being coowners, with certain other parties, of two sugar estates named "*Deep River*" and "*Quatre Sœurs,*" gave their "Procuration générale" to Théodore Arnal and one Jacques Aristide Cayrou, with power to act jointly, and separately in case of absence of either This Procuration does not contain a special power to sign promissory notes, but it gives a power "d'emprunter, (mais seulement dans le cas prévu dans les instructions laissées aux mandataires), and then only for the sum of $7,000, of which $3 000 on the Estate "*Quatre Sœurs.*"

It was proved that, at the date of these notes one of the "Procureurs," Cayrou, was absent from the Colony.

Referring to the instructions mentioned above, we find these are collective instructions given by four parties co owners of the two estates "*Deep River*" and "*Quatre Sœurs,*" they are carefuly and minutely drawn up, so as to leave little doubt as to the extent of authority given by the "Mandants" to their "Procureurs."

In these instructions the terms conveying the power to borrow, terms which are specially referred to by the "Procuration" itself, are given in a very cautious spirit. By these, their "Procureurs" are warned: 1st not to borrow, so long as they should have money in hand, and then to do so as a last resource. 2nd. to borrow by their notes "par procuration" and for the wants (besoins) of the two estates, and they give detailed instructions tracing the manner of discounting such notes.

That Théodore Arnal, in signing these notes, acted in defiance of and contrary to his instructions is clear from the evidence; the book of the firm "Théodore Arnal, A. Cayrou & Co." prove beyond doubt the fact that in January 1862 that person had in his hand, money, as balance to the credit of the owners of both estates, to a very large amount. Moreover his instructions gave him power to bind his "mandants," jointly, for the wants of the common estates and did not give him power to draw notes in the name of any one of the instructing parties separately.

That Théodore Arnal had no power to draw these notes, therefore, and that in drawing them he has not complied with his instructions, is su.

perabundently proved, and the sole question is how far the rights of a BONA FIDE holder can be affected thereby.

We are of opinion that, in this case, the Plaintiff cannot recover.

It is a principle of our law of mandate that whoever deals with a "Procureur" is bound to ascertain the extent of his mandate, and if, from the terms of the procuration, the third party was justified in inferring a power, in the "Procureur," to deal as proposed, he would then be entitled to recover, notwithstanding any concealed breach of authority committed by the "Procureur." But if from the terms of the "procuration" third parties had due warning as to the limitations of power given by the "mandants," and they choose to deal with the "Procureur" without ascertaining the full extent of such powers, they do so at their own risk, and cannot recover.

In this case we are of opinion that third parties were not justified in taking those notes. First of all, the "Procuration" did not give Théodore Arnal power to draw notes; in order to find such power they had to go to the common instructions, and there, such power is given in cautious terms and is accompanied with clear conditions, the fulfilment of which could easily be ascertained and which it so happens, were not fulfilled at the time. Third parties taking those notes were not justified in taking them without ascertaining, as they might have done, whether the "mandataire" was in a situation wherein he was empowered to draw notes. This is not a case of concealed breach of authority but a case of clear and open violation of power.

We are therefore, of opinion that Judgment ought to be for the Defendants, with costs.

SUPREME COURT.

PROCÉDURE.—EXÉCUTION D'UN JUGEMENT EN SÉPARATION DE BIENS,—PREUVE,—APPEL D'UN JUGEMENT DU MASTER.

Lorsqu'un jugement en séparation de biens a été exécuté, la présomption est que toutes les formalités requises par la loi, antérieurement à cette exécution, ont été remplies.

Lorsqu'il est prouvé que l'observation trop rigide de l'un des réglements de la Cour, en matière de forme, causerait à l'une des parties en cause un mal irréparable, les Juges, et surtout le Master, peuvent en modifier l'application et résoudre le point en litige en une question de dépens.

JUDGMENT OF SEPARATION OF PROPERTY,—EXECUTION THEREOF, — TENDER, — RULES OF COURT,—PROCEDURE,—APPEAL FROM A JUDGMENT OF THE MASTER.

Where execution of a Judgment of separation of property is proved, the party who proves it, is protected for what was to be done previous to execution.

Where the strict application of a Rule of Court in a matter of form would work irremediable injury to one of the parties, it lies with the Judges, and especially with the Master, to modify its application under the penalty of costs.

QUESNEL & ORS.,—Appellants,

versus

DORELLE & ORS.,—Respondents.

Before:

His Honor the Acting CHIEF JUDGE and The Honorable Mr. JUSTICE ARNAUD.

L. ROUILLARD, —Of Counsel for Appellants.
E. DUCRAY, —Appellants' Attorney.
J. COLIN, } Of Counsel for Respondents.
Hon. V. NAZ,
E. J. LECLÉZIO,
E. BAZIRE,
G. GUIBERT,
P. L. CHASTELLIER,
W. HEWETSON, } Respondents' Attorney.
E. LAURENT,
J. BOUCHET,
F. ROBERT,
E. DE CHAZAL,
H. BERTIN,
V. BOULLÉ,

24th September 1867.

This is an Appeal from a Decision of the Master. The heirs of Mrs. Pierre Morel produced at the "Ordre" of *Le Hangar*, on one half of the price of that Estate. The production which was made in execution of the legal hypothec of the said Mrs. Morel separated as to property, was made for $3,339 43c, and reduced by Decision of the Master to $2,865.25c.

This Decision has been acquiesced in.

But an objection was taken to the collocation of that latter claim, on the ground that the heirs Morel could not claim under the Judgment of separation, in as much as such Judgment was null, not having been executed in conformity with law, especially there being no evidence, on record, of the "affiche" required by Art. 1,445 of the CIVIL CODE.

The Attorney for the heirs Morel had produced a Writ of *fi fa*, a return of *nullâ bonâ*, and he offered to put in, at once, the "affiche," the absence of which formed the ground of the objection. That was objected to as the document had not been tendered in evidence. It was contended that by Art. 89 of the Rules of Court, the practice in the Master's Court was regulated

by these latter, and application was claimed of Art. 52 of our Rules by asking that the provisional collocation should disappear The Master, thereupon rules that "however hard may be the consequence for the heirs Morel, that the omission of notice of evidence is fatal, he rejects the claim.

We are of opinion that the Decision cannot be supported.

It would really be a misfortune to this country, if the law stood thus, that for a formal and technical omission of pure procedure, parties could lose for ever and without a remedy, real and substantial rights; that such is not the law, we hasten to say.

With regard to the question under consideration, we find in the record, 1o. A writ granting execution; 2ndly. An act of execution, a return of *nullâ bonâ*; 3rdly. A statement by the Master that the Judgment of separation alluded to had already been executed by payment, at the "Ordre" of the Estate "*Beau Climat*", of a portion of the claim of the heirs Morel, by which execution, in point of fact, the present claim of the Appellants stands actually modified.

What does the Code provide in Art. 1,445? "Toute séparation de biens doit, avant son exé-"cution, être rendue publique par affiche, &a."

Now, it is elementary law that where execution is proved, the party who proves it is protected for what was to be done previous to execution, by the maxim *omnia rite esse acta præsumuntur*. The Record contains the amplest possible evidence, proving execution, and the legal presumption is that the Office of the Court who had given the necessary warrant for execution and those who had executed would not have done so unless the conditions precedent to such execution had been fulfilled. We are, therefore, of opinion that the heirs Morel were not bound in law to prove more than they have done.

We feel bound to go further and to consider the application which the Master has made, in this case, of the Rules of Court.

The Judges who have framed those rules retain in their application a certain amount of discretion, they are to be enforced in all cases, but they are to be enforced so as to further not to defeat the ends of substantial justice; non compliance with their provisions ought to be visited with some penalty, but where "such non-compliance" does not effect the substantial merits of a case, and where the Court is satisfied, not on mere statement of parties but upon proper evidence that the strict application of a rule, in a matter of form would work irremediable injury to one of the parties, it lies with the Court to modify the application under the penalty of costs, and this, in the way which would appear to them more conducive to the ends of justice.

As it is so for the Court, it must *à fortiori*, be so for the Master. In most cases matters stand before that officer in a state of formation and preparation which excludes the possibility of a strict adherence to all the provisions of the Rules of Court. Before the Court issues are joined and parties have had an opportunity of setting out clearly the points under discussion by their Pleas and Replications; it is the right of either party that he should not go to trial until the point in issue is clearly set out on record; it can scarcely be so in most of the proceedings before the Master.

In matters of "Ordre," for instance, "Contredits" are filed and contestations raised, sometimes, between a considerable variety of distinct interests which may be modified in the course of the procedure of "Ordre"; in such matters and in a case like the present, in which there are twenty parties to the record, some of whom may or may not have a right of contesting another creditor's rights, it is difficult to understand that the formalities for the production of evidence should be exacted with the same rigidity as they would in an action at law between Plaintiff and Defendant; further more, in matters of sale, incidental questions of considerable importance, in points of law, may and do constantly arise at the last hour of a sale, such as in the case of *Germain* v. *Victor*, where the strict enforcement of the rules would be impracticable. In such cases the Master is expected to deal substantial justice to the parties before him.

Judgment of the Court is that the Decision of the Master be reversed, with all costs against the heirs Barry the only parties who support the Decision given below.

SUPREME COURT.

Assurances sur la vie.

Lorsque dans un Contrat d'Assurance sur la Vie, il est stipulé que le montant de l'assurance sera payée à la veuve de l'assuré ou à certaines personnes déterminées au contrat, les créanciers de la succession n'ont aucun recours sur cette assurance.

Dans le cas contraire l'Assurance fait partie de l'Actif de la succession et doit servir, en premier lieu, a en solder le Passif.

Life Insurance.

Where it is agreed in a Policy of Life Insurance, that the amount of the Policy shall be paid to his widow or to certain other persons therein specially mentioned, the creditors of the deceased have no right to such amount.

But where it is agreed that the amount of the Policy shall be paid to "the executors administrators or assigns" of the party insured, it forms part of the Estate of Inheritance of the latter and may be attached by his creditors between the hands of the Insurance Company.

RICHARDSON & Co.,—Plaintiffs,

versus

HEIRS JEAN LOUIS,—Defendants.

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Before :

His Honor the ACTING CHIEF JUDGE and
The Honorable Mr. JUSTICE COLIN.

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A. LEGALL, —Of Counsel for Plaintiffs.
W. FINNISS, —Attorney for same.
J. COLIN, —Of Counsel for Defendants.
E. LAURENT,—Defendants' Attorney.

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27*th September* 1867.

This was an application made in Chambers by Richardson & Co., creditors of the late Jean Baptiste Jean Louis, in his lifetime a Broker, for the validity of an attachment which they had lodged in the hands of *The Standard Life Insurance Company*, represented, in Mauritius, by Mr. F. M. Dick.

The application for the validity of the attachment was made, as usual, according to the Ordinance in Chambers, but the Judge before whom t was made referred the parties to the Supreme Court, on account of the nature of the objections offered by the heirs of the said Jean Baptiste Jean Louis.

There were two other attachments of the same kind, one at the instance of Frédéric Dyrr, another creditor of the late Jean Baptiste Jean Louis, the other at the instance of Volcy Jean Louis; the latter was not insisted upon, and it was agreed that the two cases of Richardson & Co. and Dyrr against Heirs Jean Louis should be argued at the same time, the two cases being exactly similar; and Judgment in the one case, was, it was agreed, to be also the Judgment in the other case.

When the case came on for trial,

A. LEGALL for Dyrr, and E. BAZIRE for Richardson & Co., respectively moved that their respective attachments be declared good and valid.

P. L. CHASTELLIER for John Jean Louis, Jean Baptiste Jean Louis, and Emilie Jean Louis, as heirs under benefit of inventory, abides by the Decision of the Court.

J. COLIN, for John Jean Louis and Jean Baptiste Jean Louis, as guardian and sub-guardian of the minors Jean Louis, showed cause :

"I contend that when a person insures his "life, the amount for which he has insured goes "after his death, to his heirs, not to his creditors. "The whole point is what were the intention and "nature of the contract? I say the object of "insurance is to secure the welfare of his family, "and that if the insured does not transfer his "policy, it must go to that family."

"The policy, here, is made payable to executors, administrators, and assigns. From what "law do these attaching creditors draw their assumed rights to attach this property?

In a case cited in S. V. 63, 2, 202, it was held that a policy made payable to a widow, went to her, not to the creditors of the estate.

"In another case S. V. 65, 2, 337, it was also "held that a policy made payable to heirs, went "to the heirs, not to the creditors; for the heirs "might accept under benefit of inventory and "still be heirs.

"The contract being one of pure benevolence, "it would be contrary to the policy of the law to "allow creditors to seize property from the first "meant for others."

A. LEGALL: "The Decisions quoted tell against the other side, for, the test whereby the Court is to be guided is whether the intention of the insured was to make a liberality in favour of certain persons independent of the succession, or whether the insured intended to increase the amount of his wealth, at his death.

"An heir is not an administrator, unless he takes out lessons of administration, he is an administrator by his own choice, and must act with all the rights and liabilities of one.

"If we could read heirs instead of administrators, the matter would be in the same position; for, when Jean Louis insured his life to his administrators, he meant his policy should go to his Estate.

"I refer to a case reported in "Journal des Assurances," Trib. Civil de la Seine, 27th July, 1866."

E. BAZIRE, for Richardson & Co., followed on the same side.

JUDGMENT.

On the 3rd of May 1862, the late Jean Baptiste Jean Louis subscribed and deposited at the office of *The Colonial Life Insurance Company*, in Mauritius, a declaration which was declared to be the basis of an Assurance on the life of him, the said Jean Baptiste Jean Louis, for the sum of £4,000 surety. On the 13th of June 1862, the Board of Directors, in England, accepted the Insurance, and the policy was issued from the office of the Company at Port Louis, Mauritius, on 29th July 1862.

The capital stock of the Company was charged with the payment of that sum of £4,000 to the Administrators, Executors or assigns of the said Jean Baptiste Jean Louis. On 20th September 1866, that policy of Assurance of *The Colonial Life Assurance Company* was transferred to and undertaken by *The Standard Life Insurance Company*. Vide memorandum annexed to the policy.)

It should be observed that the policy is an English policy, granted in England, by the Board

of Directors there, and only issued by the agent of the Company, in Mauritius. That fact might be of great importance in the construction of the words used in the policy, but, in this particular case it makes, practically, little difference, if any, whether the policy was issued by a Company in England or by a local company here.

The construction which we feel compelled to give to the terms of the policy would be exactly the same in either case.

In the construction of this contract, as of all others, the intent of parties is clearly the object which the Court should keep in view and try to ascertain, whenever the context makes it doubtful or liable to various interpretations.

We fully agree with the authorities cited, that if a person insures his life on behalf of some other person, his widow, for instance, the amount of the insurance is payable to such person and does not form part of the estate of the insured.

We should also be prepared to go the length of the second Decision, although that seems to have turned upon special facts; but, there, the policy was in favour of heirs, and it may well be that the Court was satisfied that the intent of the insured was that his heirs, personally, should receive the amount of the risk, and that it should not be mixed up with the general assets of the Estate.

But we must construe this policy according to its own terms, its own conditions; and the intent of the insured must necessarily be gathered not from fancifull ideas or an imaginary train of thought, but from what the insured laid down and the Company accepted, as the condition of the insurance.

The amount in this case, was, it was agreed, to be paid to the "administrators," "executors" or "assigns" of the late Jean Baptiste Jean Louis.

The plain construction of this clause, viewed as part of an English policy of insurance, issued by a Company in England, and couched in terms which have a positive meaning in English law, would be that as Jean Baptiste Jean Louis left no will, and therefore appointed no executors, made no assignment and therefore has no assigns, those persons entitled to take out letters of administration would receive the amount of the policy, and after paying the debts of the intestate would pay over the balance to the next of kin, in pursuance of the statute of Distribution.

There are legal terms in every system of law which have a clear and positive meaning in the country in which they are specially used, and when those terms are used, it would be very dangerous indeed, and assuredly unjust, to give to those legal terms a different meaning, a different force and bearing.

Would it not, then, be unjust to give to the English word "Administrators," used by Jean Baptiste Jean Louis, a word which has its own intrinsic legal force, a meaning different from its real one, because the contract where it is found is to be interpreted in a land where the word is not generally used in exactly the same sense?

We have been pressed to import into this policy the words "heirs," or "next of kin," words which have a different meaning in England, but are almost identical according to our law.

Let us say, then, for the sake of clearness that we are pressed to substitute the word "héritiers" to the word "administrators" or to give that last mentioned word the force of the word "héritiers."

Why should we do so? Heirs who do not repudiate the succession or who accept the Estate of the intestate under benefit of inventory, are certainly, we may say, administrators, but they are so for the benefit of the creditors of the intestate. Heirs who accept the succession are liable for all the debts of the deceased, heirs who accept under benefit of inventory are (Art. 803 CODE CIVIL) bound to administer "les biens de la succession et doit rendre compte de son administration aux créanciers et aux légataires."

Whenever heirs, therefore, remain heirs simply such, or heirs under benefit, and can be called "administrators," they administer on behalf of the creditors and legatees, if there be such, the Estate of which they have assumed the seizin.

If we could read the word "héritiers" as part of the word "administrators," as embodied in that second word, how could we shake off that special capacity which they are, at all events, bound to assume? the capacity of administrators. For, if they are not bound to assume it, what force or meaning could the word "administrators" have, at all?

Besides, we have in our law other administrators besides heirs, just as there may be, according to the law of England, besides the next of kin; in England, the widow is named first in the statute of Distribution; here, the Curator of intestate Estate may be, and would be, if the heirs repudiated the succession of their father, called upon to take charge of the Estate, and would be the administrator.

There can, therefore, be no doubt in our minds that by using the word "administrators," the late Jean Baptiste Jean Louis meant the person or persons who would administer the Estate according to their legal right of so doing; just as when he used the word "Executors," he meant that if he made a will and appointed "Executors" they should receive the amount of the policy; just as where he used the word "assigns," he meant to reserve to himself the power of conveying his rights arising out of the policy, to any person he chose.

Could the executors have received the money on their own account? can administrators whether they be also heirs or not, do so? Assuredly not. Assigns would do so, but under regular deed of assignment, a transfer in fact; and the use of the word "Administrators," conjointly with the words "Executors" and "Assigns" would be another proof, if any were necessary, that when he insured his life, the late Jean Baptiste Jean Louis did not show any intent to insure it specially for his heirs, personally. Why, after all, if he had so intended, would he not have

"used" the word "Heirs" so commonly, so universally used in our law.

It was urged that the policy was drawn up in general terms as all such policies are. We have no proof of this, and this cannot be, at any rate, a rule without its exceptions. The terms of this clause in the policy are not printed, there is a blank left to be filled as the Insured and Company agree. In the two cases cited to us, and in the principles of which we certainly agree, the word "widow" is used in the one, the word "Héritiers" in the other.

It happens, every day, that a creditor insures his debtor's life; contracts of insurance are every day entered into to which the words used in this policy would not be applicable; there cannot, therefore, be a general rule so stringent that the assured could not have varied it to give expression to his wishes and intent. In fact, the use of the word "assigns" showd that he reserved to himself the right of making over to any one he might legally do so, his interest in this policy.

It was suggested that the assured must be presumed to have intended to secure some property to his children, not to increase his Estate. There are no data on which this presumption can rest, and why should not the assured who was not insolvent at the time, have intended to increase his Estate? His Estate would go to his heirs; if this risk increased his Estate, the share of every heir would be larger; but at the same time there could be larger assets to meet the claims of creditors, if the assured left creditors. This was a very legitimate and honest mode of proceeding, and why should we presume that Jean Baptiste Jean Louis did not mean thus to proceed, when every word used tend to show that he meant thus to proceed?

What right have those creditors of the late Jean Baptiste Jean Louis to attach that sum of money? it was again argued; they had no right if that sum of money does not fall into the Estate of Jean Louis; but if it does, they have as much right to attach that asset as they would have to attach any other asset in the hands of any other garnishee.

Every argument must be brought back to this question; can the words "Executors, administrators and assigns," be construed to mean heirs personally, or must those words carry with them their legal force and legal effect?

We have stated that, in our jugdment, they must preserve their force and their effect; that if they could be varied by being changed with the addition of another word which is not necessarily implied in any one of them, that addition would not change the position of the Defendants, for, heirs must, in this case, be considered as administrators, and, as administrators, must pay the debt of the intestate before they pay over to the next of kin; it follows that the claims of the creditors must be satisfied before the Heirs—Administrators can apply to themselves the sums received on account of this policy.

The result must, then, be that this money being considered as forming part of the Estate of the late Jean Louis, the creditors may, by our law, attach the same, as any other asset of the Estate.

We must, therefore, declare good and valid the attachment of Richardson & Co., but as this is a case *primæ impressionis*, and stated to us to be of considerable importance, we shall give no costs against the heirs Jean Louis; personally, Richardson & Co., will take their's out of the funds in the hands of the Insurance Company.

Same Judgment in the case of Dyrr *v* Heirs Jean Baptiste Jean Louis.

SUPREME COURT.

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MINEUR,—PARTAGE EN NATURE FAIT A L'AMIABLE,—RATIFICATION.

Partage en nature, fait à l'amiable, d'un terrain possédé en indivis avec un mineur,—Vente des droits immobiliers du mineur,—Demande en licitation du terrain par l'acquéreur, et ratification du partage par ce dernier.

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MINOR,—PARTITION IN KIND MADE AMICABLY,—RATIFICATION THEREOF.

Partition in kind made amicably, of a plot of ground possessed undividedly with a minor,—Sale of the right, to real Estate, of the minor,—Licitation of the plot of ground, prayed for at the request of the purchaser,—Ratification, by the latter, of the division in kind.

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MANGALKHAN

versus

DOORGAH

and

DOORGAH

versus

MANGALKHAN.

—

Before:

His Honor the ACTING CHIEF JUDGE, and
The Honorable MR. JUSTICE ARNAUD.

—

E. DUPONT, —Of Counsel for Mangalkhan.
L. C. RODESSE,—Attorney for same.
J. COLIN, —Of Counsel for Doorgah.
F. VICTOR, —Attorney for same.

—

24*th September* 1867.

These two cases were heard on the same evidence; from their nature they are to be disposed of by one and the same Judgment.

They both sound in damages for trespass ; no damages have been proved on either side, and parties have, in fact, confined their case to the question of title ; they claim to be owners of the same piece of land of which Mangalkhan is in possession ; they both bring into Court their title and the question to be decided is which is the better in law.

Both parties derive their pretended right from the same source, up to a certain point. One Anseline owned a plot of ground of 312 acres in the district of Grand Port ; three of his heirs agreed to a division in kind, between themselves, of that plot of ground, by an act under private signatures, registered in 1849. One of these parties was one Volcy Charles Agapit Duval, in whose shoes Mangalkhan claims to stand for a portion of that ground, by a series of assignments and a purchase at the bar, dated 20th August 1863. To that act intervened a fourth heir, Jean Sénat, who agreed to it for himself and his minor son Wilfred ; he says : " moi Jean Sénat je fais fort à " garantis l'accord pour Jules Joseph Wilfred " mon mineur."

Now Doorgah derives his right from that same Wilfred Sénat who sold his right to the succession of his father and mother to one Bangar who assiged them to Doorgah.

This latter, in virtue of his assignment, caused the land in question (the identity of which has been admitted by both Counsel) to be sold by licitation, and bought it himself at the bar.

Doorgah says : the partition in kind is null ; at all events, not binding upon Wilfred Sénat, then a minor.

This legal position might possibly have stood good on the lips of Wilfred Sénat, on the day of his coming of age, but in the circumstances of the present case the Plaintiff Doorgah is barred from using it, for the following reasons :

1o. The very title of that party, *viz*: the Judgment of adjudication of the property in question, shows the adoption, in terms, by Wilfred Sénat, of the document which he says is not binding on the same Wilfred Sénat. After fully describing that document, the "cahier des charges " adds these words :

" It being observed that the said Jules Joseph Wilfred Sénat has ratified the aforesaid partition by selling his rights to &c., &c."

In presence of this statement we are not at liberty to proceed further, and we find that the title of Mangalkhan is the better title in law.

The Judgment of the Court is, on the 1st case, Judgment for the Plaintiff ; on the second, Judgment for the Defendant, with costs including the costs of intervention.

SUPREME COURT.

BAIL,—DOMMAGES ET INTÉRÊTS.

Action en dommages et intérêts intentée par le propriétaire contre le locataire, pour avoir abattu un certain nombre de "filaos" sur la propriété louée, contrairement aux conditions du bail,—£2,500 de domages alloués par la Cour.

LEASE,—DAMAGES.

Action in damages at the request of the landlord against the lessee who had cut down a certain quantity of "filaos" trees on the property leased, contrary to the conditions of such lease,—£500 damages awarded by the Court.

L. FADUILHE,—Plaintiff,

versus

WIDOW FONTENAY,—Defendant.

Before :

The Honorable MR. JUSTICE COLIN, and
The Honorable MR. JUSTICE ARNAUD.

E. J. LECLEZIO,—Of Counsel for Plaintiff.
V. BOULLÉ,—Plaintiff's Attorney.
E. BAZIRE,—Of Counsel for Defendant.
E. LAURENT,—Defendant's Attorney.

26th September 1867.

The Plaintiff brought this action against the Defendant and alleged that he had let to Célina Hippolyte, the widow of the late Delrive Cadet Fontenay, through and in virtue of several consecutive deeds of lease, the first of which dated 24th March 1857, and the last 11th June 1864, a certain plot of ground called "*Le bain des Négresses*," situate in the District of Savane, and measuring 150 acres ; and another plot of ground contiguous to the first and measuring 180 acres, under certain conditions enumerated in the lease.

That one of those conditions of the lease was that the lessee should not cut down the lines of "filaos" trees and the other trees existing and planted on the land leased, and should never even cut down the branches thereof.

That, nevertheless, the Defendant, in defiance of her contract aforesaid, did cause to be cut down and employed to her own use the lines of "filaos" trees and the other trees existing and planted on the said land, to the extent of about 30 acres ; which said land, thus cleared, the Defendant planted in canes manipulated and to be manipulated for her own use, to the damage of the Plaintiff, in the sum of five thousand pounds sterling.

The Plea was to the effect that the Plaintiff had no title or capacity to bring this action; it proceeded to traverse the facts alleged, to deny that the Defendant had been guilty of any breach of any clause of the contract of lease, and that the Plaintiff had suffered no damage.

Witnesses were heard on both sides in support of the position respectively assumed by the parties.

E. LECLÉZIO, for the Plaintiff, maintained that the case was one of fact and nothing beyond; that the breach alleged by the Plaintiff to have been committed, had been fully proved, and that the sole question left for the consideration of the Court was the amount of damages due.

E. BAZIRE, for Defendant, argued: That the lease spoke of lines of "filaos" trees; and as the prohibition not to cut down trees could not be extended, the Plaintiff was bound to show, and did not, that lines of trees had been cut down. That the true meaning of the contract was, that the "filaos" planted on the sea shore, to protect the land from the sea breeze, should not be cut down, and no more; for, the Plaintiff had hired the land to plant canes upon, paid rent for that purpose and could not be deprived of the use of such land.

LECLÉZIO, in reply, referred to the terms of the several deeds of lease in all of which the same prohibition was to be found. The evidence shows even, a complete violation of the contract.

JUDGMENT.

By the conditions of the lease under which the Defendant held, from the Plaintiff the estate *Bain des Nègresses* and adjacent lands, there was a clear understanding, on the part of the Defendant, not to cut down timber; the lines of "filaos" trees are specially mentioned and so are all other trees growing upon the said estate. It was attempted to show that the prohibition was to be restricted to the "filaos" trees which, planted in lines or rows along the sea shore, were intended to serve as a screen against the violence of the sea wind; that might perhaps have been the case under the original lease which speaks of "filaos servant d'abri," but the lease under which the Defendant actually holds goes a great deal further, and its conditions are intended to protect the landlord against the destruction not only of the screen in question, but of all other rows of "filaos" trees and all trees, in fact, growing up on the estate.

Nor is the condition a hard one, a small portion of the estate, in comparison with its absolute area, was thus covered with trees, and there was nothing more natural and more legitimate than that the landlord who had, it would appear, previously permitted the late Mr. Fontenay to cut down a certain number of trees, should guard and protect by a strict prohibitory clause, his estate from deterioration caused by the wanton and reckless destruction of his trees.

To these conditions it suited the interest of the tenant to assent, and having assented, such tenant may not surely, now, complain that he would have been deprived of the means of planting canes in a certain portion of the Estate, if the trees had been left untouched.

We can have no doubt that the amount of rent was calculated with regard to this prohibitory provision.

Now, having so contracted, and by her contract so bound herself not to cut down the lines of "filaos" and other trees on that Estate, the Defendant has, the evidence shows to us very clearly, cut down not only other trees besides the "filaos" growing in rows or avenues, but whole lines of "filaos." The Defendant has done so and has used the wood thus obtained to her own profit; she has not attempted to account to the Plaintiff for the same; she has employed the beams and larger pieces of wood to build huts on her Estate, and, says Jean Pierre Nicot, for all kinds of construction; what could not be so used, it would appear, served as fire wood.

We have no doubt that if this breach of contract took place partly before the lease dated 11th June 1864, it also took place, and this, in no small measure, after that last mentioned lease.

The damage caused by the Defendant's wilful breach on her contract has been considerable; a witness speaks of 3,000 trees felled down, another of several acres being laid waste by the Defendant.

We are of opinion that we are in no wise in excess of the real value of the wrong suffered by awarding Five hundred pounds sterling damages, with costs.

SUPREME COURT.

ASSURANCES CONTRE L'INCENDIE—MARCHANDISES PARTIELLEMENT DÉTRUITES,—EXPERTISE.

Marchandises assurées par deux Sociétés d'Assurances et partiellement détruites par le feu,—Expertise,—Contribution proportionnelle des deux Sociétés dans le montant de la prime à payer aux assurés.

FIRE INSURANCE,—GOODS PARTLY DAMAGED,—APPRAISEMENT.

Goods and Merchandises, insured by two Insurance Companies, partly destroyed by fire,—Appraisement,—Proportional amount to be paid by the two Companies.

FANTONI & ANOR,—Plaintiffs,

versus

UNION MAURICIENNE,—Defendant.

Before:

His Honor the Acting CHIEF JUDGE, and
The Honorable Mr. JUSTICE COLIN.

A. LEGALL, —Of Counsel for Plaintiffs.
F. VICTOR, —Plaintiff's Attorney.
Honorable V NAZ, —Of Counsel for Defendant.
W. HEWETSON, —Defendant's Attorney.

—

26th September 1867.

This was an action brought by the Plaintiffs to recover, from the Defendant, the sum of $15,000 with interest from the 11th day of June 1865, the amount of a policy of Insurance taken by the Defendants on certain goods and merchandise belonging to the Plaintiffs, and destroyed or injured by fire during the night of the 11th June 1865.

The Declaration set forth the Insurance, the losses, and alleged that the Plaintiffs had, at the time of the fire, in the premises insured, goods and merchandise of a value exceeding the amount of the risk.

The Plea traversed the facts set forth in the Declaration, prayed that in accordance with Arts. 16 & 17 of the statutes, a proper valuation be ordered. Further, that the Plaintiffs having without the knowledge of the Defendants, covered by an insurance in *The Mauritius Fire Insurance Company*, the goods and merchandize insured by the Defendants, the Defendants were only bound to pay a certain proportion of the risk; also that by the contract the Defendants are bound to accept in part payment the goods and merchandise not completely destroyed by fire.

The Replication joined issue on the main points but alleged that two appraisers had been long since appointed and had valued the amount of the goods of the Plaintiffs in their damaged state, and that if any thing had not been done which ought to have been done, this ought not to be imputed to the Plaintiffs, but to the Defendants' negligence and laches.

The Replication further set forth that the Plaintiffs were no longer bound to receive, in part of payment of their claim, the goods and merchandise not completely destroyed by fire.

Such were the real issues before the Court.

By the contract, the parties had agreed that should a loss occur and the parties not agree as to the amount of the damage, an appraiser, or if need be, two appraisers, one to be named by each party respectively should be appointed to value the goods and marchandise, and again, shuld the two appraisers not agree, an umpire was to be appointed by them in case of need, or by the District Magistrate.

Two appraisers had been appointed by the parties to value the amount of damage suffered; (Messrs. Dusavel and Emile Edouard) on one point they could not agree; an umpire was appointed, he wished to have witnesses; a good deal of time was lost by the parties who do not appear to have fulfilled the necessary formalities to carry into practical effect the reference they had chosen for themselves by applying to obtain for the umpire, if necessary, the powers it was assumed he had not.

When the case came for trial, two clauses of the statutes of *The Union Mauricienne* which settle the conditions of the policy granted by the Company were alluded to; but the Court consented, in order to save further delay, and probably greater expense, to take up the case and try the issues of law and fact without further reference to an umpire; thereupon:

A. LEGALL, for the Plaintiffs, maintained that they were entitled to recover the full amount claimed, for, there was evidence to show that the goods lost were worth full the value insured for; that the payment made by *The Mauritius Fire Insurance Company* was in no wise to be computed in deduction of the claim made by the Plaintiffs, because the goods lost were worth the full amount of both policies, and also because the clause of imputation contained in the statutes did not apply to the case before the Court.

He, then, minutely analysed the evidence given by the witnesses and the opinions expressed by the two appraisers appointed by the parties.

HON. V. NAZ, for the Defendant, maintained: that comparatively a very small sum was due to the Plaintiffs. The losses proved did not extend to any thing like the amount claimed, and deduction should be made of the amount paid by *The Mauritius Fire Insurance Company*, the Defendant being liable only for the 7|15ths of the balance, as no notice had been given to them of that other policy. Besides that, 10 o|o ought to be deducted from the total amount found to be due, because no notice as required by Art. 15 of the Statutes had been given of the nature of the fire, &c., only a cautious letter had been written on 11th June 1866.

Also, by Art. 7, we have the right to compel the insured to take back the goods left as a valuation and as part payment on account of the risk; that valuation has been made. The goods are valued by Dusavel and Edouard, at $ 8,994.86

The goods of the shelf entirely destroyed, at	1,500
Total.. ..	$10,494 86

We owe the 7|15ths of that sum, as our insurance is for $15,000 and that of *The Mauritius Fire Insurance Company* for $7,000 That is: We owe $4,897,60. But the Plaintiffs are bound to take at a valuation, the goods such as they stood after the fire.

They have been valued, by their appraiser, at the sum of £1,725 83. out of which *The Mauritius Fire Insurance Company* has taken $500 as a deduction. There remains for us $1,225.83 to be deducted from the sum we have to pay:

To wit	$4,897.60
(Minus)	1,225.83
	$3,671.77

And from that, 10 o/o are again to be deducted as to costs. It is true we have not deposited that amount, but we have been ready to pay and it is no fault of ours if the Plaintiffs have not proceeded in the matter as they should have done.

LEGALL heard in reply.

JUDGMENT.

The Plaintiffs had their stock in trade insured by the Defendant, in the sum of $15,000,—the original insurance had been made on behalf of Mme Bonorchis, but all her rights and liabilities arising out of the policy having been transferred to the Plaintiffs, it was admitted, and there can be no doubt of this, that the Plaintiffs were entitled to recover what Mme Bonorchis would have been entitled to recover under her policy.

The Plaintiffs, subsequently to the insurance effected with the Defendants, further insured their stock in trade for the sum of $8,000, with another Company, *The Mauritius Fire Insurance Company.*

There is no doubt, at all, that the goods insured by the two Insurance Companies were kept promiscuously in the same shop, and that the one policy did not cover one particular set of goods, the other policy another set of goods.

The goods thus insured were partly consumed by fire during the night of the 11th of June 1866, and the Plaintiffs brought their action against *The Mauritius Fire Insurance Company* and recovered that portion of their claim which the award of the Committee of the Chamber of Commerce had shown to be due to them. In that case a reference was, by the policy, to be made to the final award of the Committe of the Chamber of Commerce, and the Court found none of the reasons alleged sufficient to disturb that award. (*Vide Supra, Page* 12.)

In this case which is directed against *The Union Mauricienne*, the award above mentioned is not conclusive as to the facts with which it deals, since the parties did not agree to refer to that Committee as they had done by the other policy; but there is no doubt that the opinion of the delegates of the Chamber appointed to examine and value the losses suffered by the Plaintiffs, must have a great weight on our minds. Not only were the delegates as competent to judge of the value of piece-goods and to form an estimate from the remains of the property destroyed, as any person that could well be found, but they set about their work very soon after the fire and when every possible information could not only be more easily but also more fully attainable than at the present moment.

The main points to be decided by us are these: 1o. what is the amount of the loss suffered by the Plaintiffs? 2o. what is the proportion to be paid by the Defendants upon such loss?

The two policies covered goods to the value of £23,000. *The Mauritius Fire Insurance Company* took the risk for $8,000, the Defendants for $15,000.

By Article 9 of the statutes of the *Union Mauricienne*, the insured are bound to state if they are already insured, and if after insuring first in the Company, they do insure in another Company, they should also declare the same. In either case, however, the Company only pays, in case of loss, its proportion of the total sums insured. The Defendants are however not entitled to say that they owe only the 7/15ths of the whole; the clause in question does not say that any amount paid by another Company shall first be deducted, and the Company bound to pay a proportion on the balance only. It would be a palpable absurdity because another Company that insured for a lesser sum has paid its proportion of the risk on the whole loss the *Union Mauricienne* insuring for a larger sum, should pay its proportion not on the whole loss, but on the whole loss minus the full amount already paid by the other Company. The result might be, and would be, in this case, that the Defendants that have insured for $15,000 whilst *The Mauritius Fire Insurance Company* have insured for $8,000 the same stock in trade, would have to pay less than *The Mauritius Fire Insurance Company*, when the condition of the policy is that the Company shall pay in proportion.

The Defendants having insured for $15,000 and *The Mauritius* for $8,000, it follows that the proportion to be paid by the Defendants is 15/23, as that to be paid by *The Mauritius* 8/23 of the total amount of the loss.

This is necessarily independent of any other clause which may further reduce the proportionate amount to be paid by the Defendants.

What, then, has been the extent of the total loss?

We are not at all satisfied that the amount alleged by the Plaintiffs to have been lost by them has been made out; the evidence is, as usual, contradictory; but we believe we can easily find our way to a just estimate of the actual loss, by the light of the valuation and the reports which have been severally laid before us.

The valuation set by Dusavel and Emile Edouard, on the goods of which were left sufficient remains to enable the two appraisers to come to a conclusion, was £8,994.86. We think we ought to take that sum as a starting point; for, the appraisers agree, and they were chosen by both parties in this particular suit. The amount does not differ greatly from that which the Committee of the Chamber of Commerce recommended after comparing Dusavel and Larché's reports in the other case.

The total amount of the goods on the shelf totally destroyed we think with the Chamber of Commerce, should be set at the sum of $2,000; that is the estimate of the Committee of the Chamber of Commerce; Dusavel's is lower by only $500.

The total loss is then of	$	8,994 86
		2,000
	$	10,994 86

Out of that sum the Defendants are only bound to pay, in pursuance of clause 9 of the statutes, their due proportion, that is they owe 15[23 of that sum.

That will be $7,170.56.

But according to Art. 17 of the Statutes, the insured cannot abandon the materials or damaged goods that remain in the shop ; he is bound to keep them, and the value thereof is to be applied on account of the indemnity due to such insured.

The value of these goods we take to be, according to Emile Edouard's estimate : $1,725 53. But the whole of that value cannot be deducted from the total amount payable by the Company *The Mauritius Fire Insurance*, having already been allowed to deduct from its share of the indemnity due, its proportion of the goods not destroyed.

The proportion of the Company on 15[23 will amount to $1,125 34.

That will reduce the debt to $6,045.22.

Hon. Naz further contended that the amount which the Company would have to pay should suffer a reduction of 10 0[0 for non compliance with Art. 15 of the Statutes. The Art. does not absolutely contemplate. in every case. a loss of 10 0[0 by the insured who does not give notice within 24 hours, of the fire, of the loss he has suffered. That deduction is to be submitted by the insured upon a decision of the Council of Administration. No such decision is shown, Besides the 15th clause of the Statutes says that the insured shall point out the precise time of the event which has caused his loss, its duration, its known or presumed causes, and also the nature and approximative value of the damage suffered.

Penal conditions are never extended ; impossible conditions, even when enacted, are considered as no conditions.

It is often possible, no doubt, for a sufferer to give, within 24 hours, the explanation not required of him ; but as it may very well be that cases may occur when that is not possible, the 15th clause whilst specially imposing the above mentioned penalty, has justly provided that the deduction should not take place as a matter of course ; it is left to the fair and equitable appreciation of the Board that no doubt before insisting on the penalty would investigate the matter submitted to them.

In this case a letter was written by the Plaintiffs to the Defendants, on the 11th of June 1866, the very day following the night of the fire; it is no doubt brief; but it states when the fire broke out, at what precise hour, and starts a doubt whether it was communicated to the Plaintiffs' house or burst out in the very premises.

There is no doubt, from this letter under date 28th June 1866, that they were willing and anxious to be able to ascertain the amount of damage by them suffered.

A good many days were lost, it appears, through endeavours made to settle the matter in dispute amicably ; but we find nowhere any evidence that the Plaintiffs are to be blamed on that ground.

The Board of Administration, at any rate, whether they took this view or not, voted no resolution tending to reduce the claim, against their Company, by 10 o[o.

We think they were quite right, and cannot therefore, sustain their attempt to enforce that penalty, now.

We have already deducted from the sum due upon the policy by the Defendants all that we consider should be deducted in terms of this particular policy. The remainder to be paid and for which the Plaintiffs will sign Judgment will, then, be $6,045.22.

As to costs, the Defendants have certainly reduced the claim from $15,000 to $6,045.24 ; but they have neither paid that sum into Court nor have they tendered legally any portion of the same. Besides they have tried to reduce the claim to a much smaller amount, and have failed. We think they should pay costs.

Judgment for Plaintiffs in the sum of $6,045. 24 c. ; interest from the date of the fire, and costs.

SUPREME COURT.

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SAISIE.—TIERS DÉTENTEUR,—VENTE DE MEUBLE, —IMMEUBLE PAR DESTINATION, - PRIVILÉGE DU VENDEUR,—DROIT DE SUITE.

Vente d'un moulin, installé par l'acquéreur, sur un terrain à lui loué, avec réserve en faveur du vendeur du droit d'enlever le moulin a défaut de paiement, —Cession du bail par le locataire,—Cession de partie du prix de vente à un tiers, avec priorité et de l'autre partie au nouveau locataire du terrain, —Saisie du moulin par le tiers sur le premier locataire sans mise en demeure préalablement signifiée au second locataire en la possession duquel se trouvait le moulin,—Validité de la saisie.

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SEIZURE.—THIRD HOLDER,— SALE OF MOVEABLE PROPERTY,—IMMOVEABLE PROPERTY BY DESTINATION, — PRIVILEGE OF VENDOR, — "DROIT DE SUITE."

Sale of a mill fitted up by the purchaser on a landed Estate leased to him, with the right reserved on behalf of the vendor to take back the mill in case of non-payment,—Transfer of the lease by the lessee, - Transfer of a portion of the sale price to a third party, with priority, and of the balance of the sale price to the second lessee of the landed Estate,—Seizure of the mill by the third party on the first lessee, without any previous notice to pay served on the second lessee who was in possession of the mill,—Validity of such seizure.

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FONTAINE & SMITH,—Plaintiffs,

Versus

LANGLOIS AND ANOR.—Defendants.

—

Before:

His Honor the CHIEF JUDGE, and
The Honorable Mr. JUSTICE COLIN.

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W. NEWTON, —Of Counsel for Plaintiffs.
W. HEWETSON,—Plaintiffs' Attorney.
E. J. LECLÉZIO,—Of Counsel for Defendants.
A. PISTON, —Defendants' Attorney.

27*th September*, 1867.

The Plaintiffs, as assignees of Charles Polydor Leblanc, Engineer, and by virtue of a writ of execution of this Court against the Defendant Bonnier, caused to be seized, on the 27th June last, certain machinery lying in the District of Pamplemousses, on the Sugar Estate *Salazie*, in the possession of Elisée and Lisis Langlois, lessees of the said Estate.

On the 10th August last, Elisée and Lisis Langlois obtained a Judge's order calling upon the Plaintiffs to shew cause why a writ of injunction should not issue to stay, until further order, the sale of the said machinery on the Estate *Salazie*, whereof Elisée and Lisis Langlois are the lessees.

Parties heard, the sale was stayed on the 13th August last by the Judge, then at Chambers, until the following Tuesday or such other day after such order shall have been duly set aside.

Notice of a motion intended to be made to the Court, on the 27th August last, to set aside the above Judge's order, was served on the interested parties, with the exception of Vallet and wife, on the 23rd August last.

On the 27th August, it was ordered that the motion be renewed on the 5th September next, which was done accordingly. On its then being shewn that one of the parties who had a right of election was not before the Court, until which election the Court could not safely proceed to final Judgment, it was ordered that notice of the proceedings before the Court should be given to Vallet and wife, by Plaintiffs.

This was done and on the day appointed for proceeding with the motion, J. COLIN, of Counsel for Vallet and wife, stated that his clients had elected not to purchase the machinery referred to in the motion-paper.

The facts of this case are the following: Bonnier, lessee of Vallet and wife, had undertaken to set up a mill on Vallet's Estate for crushing the canes planted by himself and others.

To this end, he applied to one Charles Polydor Leblanc, an engineer, who undertook to supply him with a mill &a, for the sum of $10,000. But as the mill was to be put up on the land of the lessors, Vallet and wife, it was agreed in the deed of lease of the 20th Dec. 1862 and deposited with Notary L. Raoul, on the 20th November 1863, that in default, by the lessees, to fulfill their engagements with the lessors, the latter "retien- " draient comme choses à eux appartenant tout ce " que M. Bonnier aurait mis et placé sur la pro- " priété *à l'exception des usines qui restent* la garan- " tie de M. Leblanc, *jusqu'au paiement définitif* de " sa créance de vendeur des dites usines et que le " dit sieur Leblanc aurait le droit d'enlever les " dites usines, dans le cas où il ne serait pas pa- " yé, et que dans ce cas il garderait, à titre d'in- " demnité, les sommes que M. Bonnier lui aurait " payées et aussi le contrat que le dit sieur Bon- " nier promet de lui faire transporter par Mme " Bonnier son épouse, et M. Dubuisé de Ricque- " bourg aux droits de cette dernière, donnant ce- " pendant à M. et Mme Vallet le droit de gar- " der les dites usines en payant au dit sieur Le- " blanc le solde que M. Bonnier pourra rester lui " devoir."

As a further guarantee to Leblanc, for the payment of the $10,000 worth of machinery to be supplied to Bonnier, the latter bound himself, as above stated, "à faire transporter à Monsieur Leblanc, mais en garantie seulement, par Madame Bonnier, son épouse, une inscription de la somme de $3,000, en première ligne, prise au profit de cette dernière, sur un immeuble situé à St. Denis, Ile de la Réunion, et dont la *rétrocession* ne devra s'effectuer qu'après l'entier acquittement de la sus-dite somme de $10,000.

Leblanc, by a contract under private signatures of the 20th May 1862 purchased from the Plaintiffs Fontaine and Smith, for the sum of $1400, the mill specified in the private agreement, payable in two instalments of $500 each, and one and the last instalments of $ 400 with interest at 12 per cent per annum.

The better to secure the Plaintiffs the payment of the said sum of $1,400, with interest, Leblanc, by the same writing under private signatures, assigned a sum of $1500 to them, "à prendre par priorité et préférence à lui-même, *et à tous autres cessionnaires*, sur le 1er terme échéant le 5 Décembre 1864, de la somme de $10,000 à lui due par Ed. Bonnier et formant le montant du prix moyennant lequel il a vendu au dit sieur Bonnier, diverses machines établies par ce dernier sur des terrains situés à "La Nicolière," et loués par lui à bail de M. et Mme Adolphe Philoctète Vallet.

By a notarial instrument of the 29th April 1867, Bonnier assigned his lease and machinery, to Elisée and Lisis Langlois. The assignment recites the transfer by Mrs Bonnier to Leblanc of $2000 due as her share in the sale price of an immoveable situate at St. Denis, Reunion island, in performance of the undertaking of Bonnier to Leblanc, in the lease of the 20th December 1862, and 2udly. " que cette créance de $2000 appartient aujourd'hui à MM. Benoit Fontaine et John Smith, en vertu du transport que leur a fait M. Leblanc, aux termes d'un acte passé devant le dit Me Raoul et son collègue, notaires, le 1er Décembre 1863"

3o. That, " l'accomplissement de certaines formalités à l'île de la Réunion a retardé le paiement de cette somme de $2000, mais Mme Bonnier n'en a pas moins des droits à exercer sur les usines dont il s'agit, par suite du transport par elle fait à M. Leblanc.

" Dans cet état de choses," continues the assignment: " Madame Bonnier—cède et transporte à Messrs. Langlois—tous les droits qu'elle a à exercer sur les usines sus-énoncées, en vertu des actes ci-dessus relatés."

The Plaintiffs, unpaid, sued Bonnier in payment of the sum of $1,500 assigned to them by Leblanc on Bonnier, in part payment of the machinery put up on the land leased from Vallet and wife.

Bonnier not appearing to the Declaration, a Rule of Court was served on him to shew cause, on the 11th June, why judgment should not be signed against him, for want of a Plea.

Bonnier not shewing cause, judgment was given against him on the said 11th day of June last for the said sum of $1,500,63c. principal debt, with $13.05c. for interest up to the date of the Judgment, and $128 for costs.

On the 27th June last, the Defendant not having paid the sums above mentioned on the service upon him of the writ of execution, the Usher, at once, proceeded to the seizure of the steam engine sold by Plaintiffs to Leblanc and by the latter to Bonnier, which, together with other machinery, were found on the Estate *Salazie* and in the possession of the said Elisée and Lisis Langlois who now dispute the validity of such seizure.

One of the grounds of nullity of the seizure complained of was that it had been made after Elisée and Lisis Langlois had purchased from the Assignees Leblanc the remaining part of Leblanc's claim in and over the machinery seized. By such purchase the machinery became the joint-property of Elysée and Lisis Langlois and of the Plaintiffs.

That the remedy of the Plaintiffs to compel performance by his co-proprietors Elysée and Lisis Langlois, of their obligation, was an action in Licitation and not the seizure of the joint property.

The Plaintiffs, whilst recognising the purchase by Elysée and Lisis Langlois of the remaining portion of Leblanc's claim from his Assignees, contended, nevertheless, that, had Bonnier continued in the possession of the machinery, he would have been assuredly liable to the seizure of the machinery in question.

That Elysée and Lisis Langlois, as lessees of Bonnier, were none other than Bonnier himself, and as such, like their lessor, liable to the seizure complained of.

The subsequent purchase by Elysée and Lisis Langlois from Leblanc's assignees, of the balance remaining due to Leblanc, could not deprive the Plaintiffs of rights previously vested in them, and of which they had notice, and of the legal remedies attached to such rights.

The seizure was therefore the true remedy to be resorted to by the Plaintiffs and not the Licitation suggested by the Defendants.

JUDGMENT.

The only point at issue before the Court is the legality or illegality of the seizure effected.

Of two things one; either the machinery in question is an Immoveable by nature or by destination; (Art. 517 C. C.) or a moveable by nature or by determination of law. (Art. 527 C. C.)

In the first case, the seizure should have been made upon the party in possession of the immoveable, that is, the " tiers détenteur ", after commandement to the original debtor, and after a summons to pay served on the "tiers détenteur." (Art. 2,169 C. C.)

But, here, this cannot be an immoveable by destination; the machinery was not placed on the Estate by the owners of the Estate, it must be held as a moveable.

Now, by their contract, the Plaintiffs have the right " d'enlever les dites usines dans le cas où il (Leblanc) ne serait pas payé."

It is true that the Defendants Langlois obtained a transfer of a portion of the original debt; but when they accepted the transfer of such portion of the debt, they should have inquired whether or not the other portion not transferred to them had not been assigned to another, with priority.

They do not do so; and as a fact, Leblanc, or the Plaintiffs who hold Leblanc's right, have such priority.

The claim of the Defendants is saddled with that priority which, in this case, carries the right to take away the machinery.

Has Leblanc or have the Plaintiffs done any thing to modify their contract or lose their right? that is not shown.

Why, therefore, should not the Plaintiffs use their right?

It was said that a Licitation should have been asked; assuredly that might have been the remedy if the Plaintiffs had not the positive right to take away, along with their right of priority.

It was not the Defendants but Vallet to whom was reserved the right of paying off the unpaid creditor or abandoning the machinery in question.

Vallet alone, therefore, was entitled to a " mise en demeure " to elect.

He does not complain.

The Defendants have but themselves to blame if they accepted a transfer of a portion of the

purchase price of the machinery in question without examining into the powers of the assignors to assign, or the value of the subject matter assigned.

The Defendants were warned of the prior transfer to Leblanc; they do not shew that Leblanc or the Plaintiffs have received any portion of the collateral security assigned by Mrs Bonnier.

It is not the fact that the machinery is the undivided property of Plaintiffs and Defendants; but Plaintiffs and Defendants have a lien on the property; but the property is absolutely taken away by the Plaintiffs who hold from the vendor, unless they are paid, the terms of the contract are quite plain.

A "mise en demeure" to pay, would, no doubt, have been a proper mode of proceeding, instead of a seizure abruptly made on property now held by the Defendants. But that can only bear upon the question of costs. The right of the Plaintiffs to take away the property pledged to them is not curtailed; whilst, therefore, we are of opinion that, there being no danger to lose their pledge the Plaintiffs should have warned those who had such pledge in their possession before they resorted to the severe measure of a seizure, yet we do not find enough to satisfy us that the seizure ought not to have been made.

The Judge at Chambers stayed the proceedings until the opinion of the Court should be taken upon this matter. We now order such proceedings to be carried on, but, as the Defendants have a claim upon such machinery, posterior however, to the full payment of the Plaintiffs' claim, we shall allow them 8 days to pay the Plaintiffs such claim.

The Plaintiffs taxed costs to be costs of sale.

SUPREME COURT.

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OUVERTURE DE CRÉDIT,—HYPOTHÈQUE.—INDIVISION, — GARANTIE PERSONNELLE, — APPEL D'UN JUGEMANT DU MASTER.

Le co-propriétaire qui intervient dans un acte d'ouverture de crédit et consent à hypothéquer sa part dans la propriété commune pour garantir le remboursement des avances, n'est pas personnellement responsable à moins de stipulation expresse.

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OPENING OF CREDIT,—MORTGAGE,—UNDIVIDED PROPERTY,—PERSONAL GUARANTEE,—APPEAL FROM A JUDGMENT OF THE MASTER.

The co-owner of a landed property who intervenes in a deed of opening of credit and grants a mortgage on his share, as guarantee of the reimbursement of the advances to be made, is not personally liable except under a special clause.

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THE CEYLON COMPANY,—Appellants.

Versus

BOUILLÉ AND ORS,—Respondents.

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Before:

His Honor the ACTING CHIEF JUDGE and The Honorable Mr. Justice ARNAUD.

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J. COLIN — Of Counsel for Appellants
W. HEWETSON, — Appellants' Attorney.
P. L. CHASTELLIER, L. ROUILLARD, — Of Counsel for Respondents.
P. E. DE CHAZAL, — Respondents' Attorney.

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16*th October* 1867.

This appeal on the part of *The Ceylon Company Limited*, from a Judgment or Order of the Master, of the 27th May ultimo, in the Order of the estate "*Le Hangar*," though objecting to the whole plan of distribution pursued by the Master, is practically directed against the collocations of the claims of the heirs Morel, the heirs of Barry the wife, of D'Emmerez the wife, of which the applicants complain as being prejudicial to their rights.

The grounds of Appeal against the collocation of the heirs Morel, are 1o. Because admitting the validity, in law, of that claim, the latter cannot rank prior to the preferable right of the appellants in the "Ordre" of the sale price of the *Hangar*. 2o. Because the claim of the heirs Morel is actually extinct by prescription. 3o. Because, at all events, the claim of the heirs Morel ought to be reduced by the Master, supposing the Master's Judgment, in support of such claim, to be good in law.

Owing to the uncertainty of the fate of the claim Morel, until the Judgment of the Court shall have been given on the appeal of the heirs Morel from the Decision of the Master in the same "Ordre" of the "*Hangar*."

ROUILLARD, for the heirs Morel, assented to COLIN'S proposal to delay the argument on this head of his Appeal, until after Judgment on the appeal of the heirs Morel.

COLIN therefore proceeded to discuss the merits of the claim of the heirs D'Emmerez, which it was contended could not be collocated to the prejudice of the claims of the Appelants, D'Emmerez the wife, being bound to pay the claim of *The Ceylon Company*.

COLIN, rested his objection chiefly on the contract entered into between the company and the then owners of *The Hangar* Estate, of which Mrs. Eugène D'Emmerez was one, for 1|18th share therein, as heiress of her mother Mrs. Ivanoff Dupont.

It was contended that having, as such owner, mortgaged her share along with the shares of the

other owners of the estate, in favor of the company, she could not be collocated to their prejudice; that such mortgage was a personal undertaking, on her part, to pay the debt contracted by the other owners towards *The Ceylon Company*, not only out of her personal share in the estate, but out of whatever other claims she might have against the estate and her co-owners, such as those arising from the legal mortgage now set up by her for the purpose of defeating the rights of the company.

The inference drawn from the mortgage given to *The Ceylon Company*, by the Respondent, was most emphatically denied by CHASTELLIER, who, admitting the existence of the mortgage, called the attention of the Court to the wording of the obligation undertaken by the Respondent.

The notarial Ouverture de Crédit of the 16th February 1862, is between *The Ceylon Company* and the owners of the Estate *Le Hangar* minus the Respondent, who however intervening in the act, thus expresses herself" : Pour garantir encore davantage à Mr. Arbuthnot, ès qualités, " le remboursement des avances par lui faites à " Mesrs. et Mdes Dupont sus nommés ;

" A, par ces présentes, déclare, affecter et " hypothéquer au profit du dit Monsieur Arbuth- " not, ès qualités, le 18me du bien " *Le Hangar* " " lui appartenant pour l'avoir recueilli avec " ses frères MM, Eug. et Ivanoff Dupont, sus " nommés, dans la succession de leur mère, comme " on l'a vu ci-dessus.

" Consentant que toutes inscriptions néces- " saires à la sûrete de la dite ouverture de crédit " soient prises sur le dit 18me de propriété. "

The pledge given to *The Ceylon Company* has been exhausted by the latter. The share of the Respondent in the estate, has been seized and disposed of, along with the shares of her co-owners, and on the score of this pledge the Company have nothing more to claim at her hand.

The claim now disputed by the Company has nothing to do with the Respondent's rights as late owner of the " *Hangar*, ' of which she has been divested by the sale of the estate, at the Bar.

She claims nothing as *owner* or *late owner* of the " *Hangar* ; " but as *late ward* of Evenor Dupont, she claims to be collocated for the amount of her *legal mortgage* upon the *share* of her *late guardian* Evenor Dupont in the sale price of the " *Hangar*." Her right of preference over *The Ceylon Company* is indisputable.

JUDGMENT.

At first sight it may seem rather strange that Mrs. D Emmerez bound, with the co-owners, to pay the sum due to *The Ceylon Company* should at the same time, be entitled to a preference over that Company, and should thus, and to the amount of her claim defeat the claim of the Company against herself and co-owners.

But a few moments reflection cannot fail removing such apparent strangeness.

The Respondent D'Emmerez inherited from her mother certain rights, which were confided to the administration of Evenor Dupont, her duly appointed guardian. From the date of such appointmentt, he immoveable property or properties of Evenor Dupont became charged by an express enactment of the law with a mortgage, equal, in amount to the rights of his ward.

Her present purpose is to have refunded to her the sum or sums belonging to her, and committed by law to the custody of her guardian, Evenor Dupont, out of the share accruing to the latter in the sale price of the *Hangar* Estate.

The rights claimed by Mrs. D'Emmerez date as far back as 24th December 1850.

Whereas those of *The Ceylon Company* do not go further back the 16th February 1863.

In point of time her claim is evidently preferable to that of the Company.

In point of law, the rights of a minor have a just preference over the other creditors of an estate (the unpaid vendor excepted) ; without such preference, the minor would be at the mercy of an unscrupulous guardian and of an unprincipled creditor.

It is the duty of every money lender to ascertain the nature of the debts encumbering the estate of the party applying to him for money ; to see before parting with his funds to the clearing away of all encumbrances likely to interfere with the future free exercise of his rights.

Should he have neglected to do so, this is no reason why the special protection afforded to the minor, by the law, should be withholden from the helpless infant.

But it has been said that by her contract with *The Ceylon Company*, she has parted with all her rights of whatever nature without any exception in and over the Hangar Estate.

We cannot agree in this construction of the obligation undertaken by her.

The Respondent has stipulated in very express term that, the better to guarantee the payment of the sum advanced to her co-owners, she mortgages her 18th share in the *Hangar*. That is the pledge given by her, and no other. This pledge *The Ceylon Company* have exhausted.

Why should the Respondent be called upon to do more than she has undertaken ?

The Master was fully justified in the conclusion arrived at by him, and the collocation of Mrs. d'Emmerez, for the sum found due to her by the Master, must be and is accordingly maintained by the Court.

The Appeal of *The Ceylon Company* as to Mrs. D'Emmerez, is accordingly dismissed, with costs against the Appellants.

COLIN having given up his appeal against the heirs Barry and Jean César, the Appeal of *The Ceylon Company*, as to those heirs and Jean César, is accordingly dismissed in like manner, with costs; and their collocation, such as it has been made, is therefore affirmed by the Court. After hearing COLIN and ROUILLARD, on the 24th Oct instant, month upon the Appeal of *The Ceylon Company* against the collocation of the Heirs Morel, the Appeal is dismissed, with costs; the heirs Morel must be collocated for the sum of $ 2866. 25. found due to them by Judgment of this Court of this day's date.

And it is ordered by the Court, here, that the Master do finally close the order in conformity to the several Judgments given on the several appeals.

The Appeal is also dismissed as to those collocations not objected to on Appeal, with costs against *The Ceylon Company* Limited.

SUPREME COURT.

FAILLITE,—TENUE DE LIVRES,—CERTIFICAT.

BANKRUPTCY,—BOOK KEEPING,—CERTIFICATE.

BANKRUPTCY B. D.

Before:

The Hon. Mr. JUSTICE COLIN, Commissioner.

E. PELLEREAU, —Of Counsel for Bankrupt.
A. ROHAN, —Attorney for same,
E. DUCRAY, —Attorney for the Assignees,
P. L. CHASTELLIER,—Of Counsel for Ireland, Fraser & Co.,
G. A. RITTER, —Attorney for same.

23*rd October* 1867.

In this case, after the examination of the Bankrupt and of the witnesses called, a Certificate-sitting was ordered to be holden on 9th September 1867, when E. PELLEREAU moved that a Certificate of conformity be allowed to the Bankrupt; DUCRAY for the Assignees, objected and contended that the Bankrupt had absolutely failed, to explain, even plausibly, the facts which the Assignees and Ireland, Fraser & Co. had charged him with. The facts upon which the argument turned, are taken notice of in the Judgment of the Court.

JUDGMENT.

The Law is imperative, and justly so; a trader must keep books, and when the course of trading extends over a period of several years, books properly kept are not only useful to the trader's creditors who wish to ascertain the nature of such trader's transactions, but useful to the trader whom they often shield from unjust suspicion, and uncalled for charges. Such a law should be strictly obeyed, sternly maintained.

It is very true that although a trader has not kept books during the course of his trading, the Court will not absolutely refuse a Certificate, unless there be evidence to induce the Court to believe that fraud was intended.

But, at the same time, the Bankrupt is bound to show why he has not kept those books, at least, which the Law calls upon him to keep; and when no satisfactory reason is given, no plausible cause is alleged, the Court must visit with some kind of punishment the more than gross negligence disclosed by such a state of things.

A fortiori when facts are shown which disclose certain transactions of an evidently fraudulent nature, must the suspicion grow stronger that the Bankrupt has purposely failed to keep the books which, if kept, would have assisted his Assignees in inquiring with more precise certainty into his affairs and discovering or following out transactions which through the want of Books, pass unknown or unnoticed.

In this case the Bankrupt has been 13 years in the grocery trade and never kept books at all, so he states, himself, until the 3rd May 1865.

On that day a Journal is opened, and certainly I cannot say that there is more than a very strong suspicion; but there certainly is a very strong suspicion, in my mind, that the Books so purporting to be kept since the 3rd May 1865, were prepared and arranged for the purposes of Bankruptcy.

It is really astounding that from the 3rd May 1865 to the day that the Bankrupt filed a Declaration of insolvency, to wit: 3rd April 1867, the same pen, the same ink, seem to have been forthcoming, so much so, indeed, that the Book stands out apparently to have been written from beginning to end on one and the same day. If this be but a presumption, and I repeat a very strong one, the fact, at all events, is patent and admitted that for years before, no books, at all were kept; why and for what purpose is not explained.

It is stated that an Inventory was made by the Bankrupt, when his wife died; that proves absolutely nothing; an Inventory discloses the goods or assets found, it does not show and cannot show, except under exceptional circumstances not found in this case, what the course of dealing has been for several years previous to such Inventory.

But, when I come to test the intent and the conduct of the Bankrupt by facts which have taken place since he has kept books, if he has kept books, I find that a few days previous to his bankruptcy he had bought a certain quantity of porter from Ireland, Fraser & Co.; now, he must have known, on the 15th of March, that he would not pay for that porter since he himself filed a Declaration of insolvency on 3rd of April;

no creditor appears to have moved in the matter until the 4th of April; but the porter is purchased and what does he do? he sells it again, some of it in April; he receives money for the same, what has he done with the money? the sale of the porter by him, no where appears in his books, and the money is not forthcoming; the bankrupt says at one time, that he sold a few casks up to 21st March, to pay accounts due to Ireland, Fraser & Co. and to Hammond, and then he states that he kept the money for his maintenance, and to pay his Attorney and Counsel, seeing that his creditors would not give him time.

From all those contradictory statements, two facts arise plainly; first that a few days before his own declaration of insolvency he bought porter of Ireland, Fraser & Co.; and secondly that he sold that porter, or a considerable portion of it, applying the price not to satisfy his creditors, but to his own private purposes.

Now, that will not do, his duty was, even if he did not contemplate bankruptcy, which I am satisfied he did, for he took personally the first step to get into bankruptcy, even then, after having sold the porter, he ought to have accounted for the money to his creditors, and in whatever manner he did that, his books should have disclosed the fact that he had received money for the porter by him sold.

Now, viewing the fact that for years he has kept no books at all, by the light of this transaction, I am satisfied that there is enough to show that it was not from mere ignorant carelessness or negligence that he omitted to keep books.

It was attempted to show that the Bankrupt, since the time he states he began to have books kept, did not keep them himself, but employed an accountant who might have omitted the entries not found. That may be, but the Accountant says he writes the books from notes given him by the Bankrupt, and evidently no such note was given through which the Accountant could have gathered the fact that the price of the porter sold, as before mentioned, by the Bankrupt, has been paid to and received by him.

There is no sufficient evidence to lead me to hold that the Bankrupt does not, in reality, owe the rent which he says he is indebted in. This is a claim which the Assignees will resist in the proper manner, if they think fit; but the matter is not one which is proved to militate against the Petitioner.

For the reasons, however, which I have given above, and on account of the facts sufficiently proved, I am of opinion that the Bankrupt is not entitled to any certificate; and I refuse to grant him one. In three years from this day he may renew his application, according to the Ordinance.

SUPREME COURT.

APPEL AU CONSEIL PRIVÉ,—COMPÉTENCE.

Le droit d'un créancier, ayant contredit à un Ordre, d'en appeler au Conseil Privé de Sa Majesté, se règle, non par le montant de sa créance ni par le chiffre de la somme distribuée par le Procès-Verbal d'Ordre, mais par le montant de la somme contestée par le contredit et sur laquelle la Cour Suprême a été appelée à se prononcer.

APPEAL TO THE PRIVY COUNCIL,—JURISDICTION.

The right of a party contesting a Scheme of "Ordre" to appeal to Her Majesty in Her Privy Council, will not be determined by the amount of his claim or by the amount of the sum to be divided by the proceeding of Ordre, but by the amount contested which formed the issue submitted to the Decision of the Court.

THE CEYLON COMPANY,—Appellants,

versus

BOULLÉ AND ORS.,—Respondents.

Before:

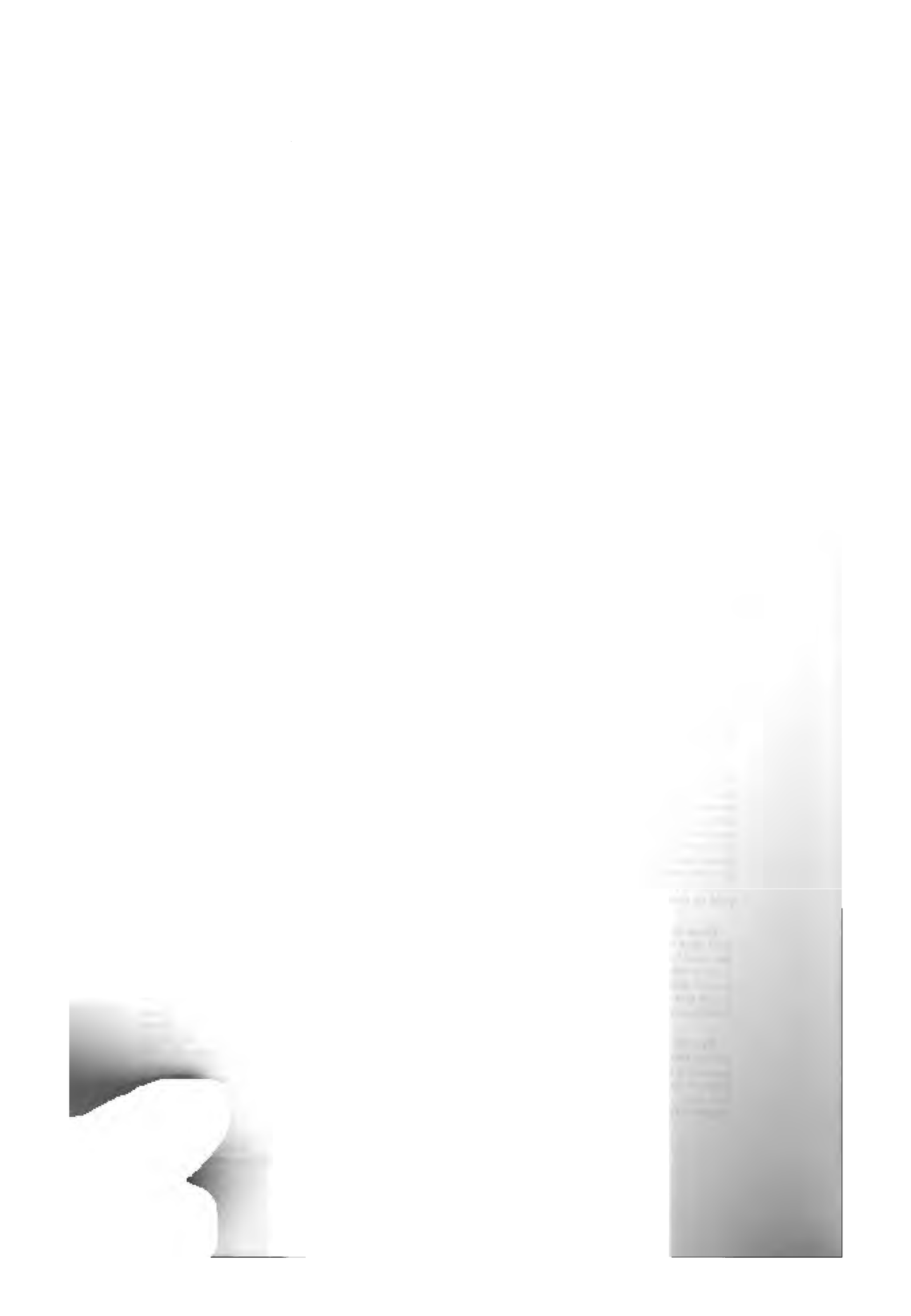
His Honor the ACTING CHIEF JUDGE and
The Honorable Mr. JUSTICE ARNAUD.

13*th December* 1867.

This is a Motion for leave to appeal to the Judicial Committee of HER MAJESTY'S PRIVY COUNCIL, of a Judgment under date of the 16th October 1867. (*Supra, Page* 73.)

This Judgment was given in the matter of the "Ordre" of the Sugar Estate *Le Hangar*; the procedure of "Ordre" had been gone through before the Master, for the purpose of distributing amongst the creditors the sum of $37,990.58c., being the balance, after payment of the Sequestration account, of the sale price of that Estate.

The Master gave his Order on the 27th May 1867, whereby he closed the "Ordre." Against his Decision, three appeals were heard before the Supreme Court, one of these appeals came before us under the style of *Quesnel & ors.* v. *Dorelle & ors.*, and was made by several parties against the collocation of the Heirs Morel, but was supported only by the Heirs Barry. The second appeal was made by *The Ceylon Company* against the Heirs Morel, raising a point of law different from that which was raised by the last mentioned appeal to which *The Ceylon Company* had remained a stranger; lastly an appeal of *The Ceylon Company* against the collocation of Mrs. D'Emmerez; these appeals were disposed of by three Judgments bearing the same date and purporting to convey the De-



cision of the Court on the mode of distribution by way of an "Ordre" of the balance of price before mentioned.

It is of that Decision that an appeal is prayed.

This application is resisted by all the other parties to the "Ordre"; L. Rouillard, for the Heirs Morel, says that the collocation of his clients amounts to $2,866.25c., that so far as they are concerned the issue between them and *The Ceylon Company* is under the Statutory figure of £1,000.

E. Leclezio, *Junior*, for the Government Saving's Bank, says that the collocation has not been contested before the Court; that he cannot be made to wait the issue of an appeal in a matter in which his right is not in issue.

P. L. Chastellier, for Mrs D'Emmerez: the collocation of his client is only $1,354 58c. which amount added to that of the Heirs Morel, the only other collocation impeached by The *Ceylon Company*, gives a figure below the appellate amount.

G. Guibert, for Jean César and the Heirs Barry: the appeal against the collocation of my clients was abandoned in Court; why should my warrant of payment not issue at once?

J. Colin, for *The Ceylon Company*: the Judgment is to the whole ordre, of which the aggregate amount exceeds £1000; moreover *The Ceylon Company* claimed to be collocated for the whole of their claim which exceeds the Statutory amount. The legal test for appeal is the amount in issue directly or indirectly; in this case the amount in issue exceeds £1000.

JUDGMENT.

As a general rule we are unwilling to deprive parties from the benefit of an appeal, unless the case is so clear that it can admit of no reasonable doubt under the Order in Council.

In this case we cannot allow the appeal prayed for.

Not only do we think that the matter is not appealable from the real amount which was in issue before us, but we could not feel justified in extending the power of appeal in a case like this where the appeal would work a serions injury on parties whose rights have not been contested and who could not obtain execution except provisionally and under conditions.

This application is made in matter of "Ordre," a procedure of a peculiar nature, the object of which is to divide the sale price of an Immoveable property between a number of creditors, and though the amount to be divided exceeds one thousand pounds, it does not follow that the matter in issue exceeds such amount; it may and very often happens that of a number of claims praying to be collocated to an Ordre the larger number is not objected to.

It is, clearly, not possible to take the sum to be divided as conveying in itself the legal test required by law; and it is so tho' the whole scheme should have been objected to in toto in a general way. In a matter of that nature where the rights of several creditors come to be ascertained, some clashing, some going uncontested, it must and it does happen that issues are raised, and it is our opinion that from the nature and importance of those issues in point of figures depends the right of appeal.

We are of opinion, also, that the figure of the claim of the party wishing to appeal in a matter of "Ordre" does not, in itself, carry the test required by the Order in Council that the right of appeal will be determined by the amount being the whole or a portion of such claim for which the party has *bona fide* claimed to be collocated and which being contested forms the subject matter of an issue to be determined, and that the right of appeal will be dependant upon the amount of that issue; for instance suppose a creditor for £2,000 claiming to be collocated on a sale price amounting to £800. Clearly the issue in such a case is restricted to the latter amount, and it must be so even tho' the sum to be divided is larger than £1,000 if from admission or otherwise the parties have really restricted the issue under consideration of the Court below the statutory figure. For instance let us suppose a creditor for £2,000 producing at an "Ordre" for the division of the same amount, if from the fact of his not having objected or appealed he is finally preceded by claims to the amount of £1,500. leaving a balance of £500 claimed by the creditor and on which issue has been raised, it is clear that the latter amount and not the amount of the creditor's claim will determine the right of appeal; and it little matters if there is a general objection to the whole plan of distribution if that general objection has not had for effect to put in issue the distribution of the first £1,500.

Applying these principles to the case under consideration, we find that *The Ceylon Company* tho' a creditor for $27,000, tho' they have objected in a general way to the whole plan of distribution, have however limited the issues upon which they have called for the Decision of the Court, and have done so in the document which, by our rules, limits the extent of contestations of this kind before the Court, that is, the notice containing the reasons of appeal from the Master's Decision.

By that act *The Ceylon Company* appeals: 1st against the collocation of the heirs Morel; 2ndly of the heirs Barry; 3rdly of Mrs. D'Emmerez. Then follows a general objection to the whole plan. On the day when the case was called for hearing, *The Ceylon Company* had it recorded that they abandoned their appeal against the Heirs Barry so that the issues raised were touching the two collocations of the heirs Morel $2,866.25 and that of Mrs. D'Emmerez $1,354.58=$4,220.83.

One thing is very clear, it is this: that out of the sum to be divided, that is $38,000 in round numbers, the larger sum which has been collocated to a certain number of creditors

cannot be disturbed; neither the amount of *The Ceylon Company's* claim, nor their general objection to the plan of distribution can affect the situation of those parties against whom there is no appeal, whose rights have not been placed in issue; and the "Ordre," in point of fact, stands before the Court, practically, as admitted, except as to the collocations of the heirs Morel and Mrs. D'Emmerez, that is for claims which united do not amount to the statutory figure.

It has been contended before us that the amount required to determine the appeal ought to be the sum contested in each issue and not the aggregate amount gathered from several issues; we deem it unnecessary to decide the question in the present case, in as much as the aggregate amount of the issues raised fail to reach the amount required.

We are, therefore, of opinion that the appeal prayed for cannot be allowed; Motion of *The Ceylon Company* dismissed, with costs.

SUPREME COURT.

MAÎTRES ET SERVITEURS,— SALAIRES,— PRIVILEGE.—FOLLE ENCHERE,—APPEL D'UN JUGEMENT DU MASTER.

Le recouvrement de la créance privilégiée des laboureurs, pour leurs gâges arriérés, ne peut être poursuivi par la voie de la "Folle Enchère" contre l'Adjudication de la propriété vendue, avant que la distribution du prix de vente n'ait été établie suivant les prescriptions de la loi.

MASTER AND SERVANTS,—SALARIES,—PRIVILEGE,—FOLLE ENCHERE,—APPEAL FROM A JUDGMENT OF THE MASTER.

The payment of the privileged claim of Laborers, for arrears of wages, cannot be sued out by way of "Folle Enchère" before the distribution of the sale price thereof has taken place conformably to law.

THE CEYLON COMPANY, LIMITED, Appellants;

Versus

HARDY & ORS.,—Respondents.

Before:

His Honor the CHIEF JUDGE, and
The Honorable Mr. JUSTICE ARNAUD.

A. LEGALL, —Of Counsel for Appellant.
E. DUVIVIER, —Appellant's Attorney.
L. ROUILLARD,—Of Counsel for Respondents.
A. J. COLIN,—Respondents' Attorney.

19th December, 1867.

This is an appeal of the Master's Decision of the 17th of November last, given under the following circumstances:

The Estate "*Hauterive*" sold on the expropriation of the Heirs Lebreton, purchased by Baissac (Bazile Charles,) was resold over the latter by "Folle Enchère" and purchased at the bar by the Respondents, 25th April 1867.

The Appellants claimed, as creditors alleging to be subrogated in the rights of certain Indian laborers, to be paid at once, previous to the "Ordre" and out of the price of the Estate. They claimed under Art. 17 of Ordinance 15 of 1852, and, in default of payment, applied for a certificate previous to suing the resale by "Folle Enchère," which the Master declined to give on the objection of the Defendants; this is the appeal of that Decision.

The Appellants bring into Court a certain number of documents purporting to establish their right to act in lieu and stead of the Indian laborers; these are: 1st an agreement between Baissac and *The Ceylon Company*, before Notary Raoul, under date 23rd of October 1866, containing an undertaking by the latter to pay certain wages due by Baissac, under an express condition of subrogation into the profit of a Judgment of the Stipendiary Magistrate of "Poudre d'Or." The Judgment was given, in course of law, on 18th of October previous, for $4,789, amount of wages due to the laborers named therein; 2ndly an act before the same Notary, containing payment with subrogation of the sum of $4,586.50, amount of those wages; 3rdly a summons to pay served on the Respondents; 4o. an exparte Order of the Honorable the Acting Chief Judge, purporting to be made in conformity with article 17 of Ordinance 15 of 1852 and ordering payment by the Respondents of $3 564 in subrogation of laborers' wages, and $233 in subrogation of certain notarial fees, and $90 for costs.

A. LEGALL, for *The Ceylon Company, Limited*: the documents prove the Appellants to be in the right of the Indians and to have done all that was required by the Ordinance in order to obtain immediate payment; by the Master's refusal they will have to wait many months before they can expect to be paid.

L. ROUILLARD for the Respondents: First, assuming the Appellants to be creditors, they have no right to sell by "Folle Enchère;" that right only exists from non execution of the "Cahier des charges." 2ndly the Ordinance 15 of 1852 provides a remedy when wages are claimed by Indian laborers; and assuming a subrogation to exist in this claim, it does not give to the Appellants the special mode of recovery which has been provided for the Indian laborers exclusively.

We are of opinion that the Decision of the Master ought to be affirmed. The right of suing the resale of the property by "Folle Enchère," which is claimed by the Appellants is not an ordinary right like those attached to the title of

creditor. It is a special remedy provided in certain cases, and beyond these cases it is not in the power of the Court to extend it; POTHIER calls it a sort of resolutive action, in fact its effect is to annul a judicial contract.

The resale by "Folle Enchère" carries with it certain legal effects which gives it the character of a penalty; the resale of the property is proceeded with in a summary manner. (Art. 739.) The party liable to "Folle Enchère" is liable by arrest for the difference in the price fetched on the 2nd sale. (art. 744). These are stringent remedies and they are provided in the only case where the purchaser has not fulfilled the conditions of his purchase. "Faute par l'adjudicataire "d'exécuter les charges de l'adjudication." Now the "clauses d'adjudication" are laid down and written in the "cahier des charges," and the non execution of those conditions alone could justify the Master in allowing the "Folle Enchère" to take place.

The "Cahier des charges" in the matter of the sale of the Estate *Hauterive* lays it down that the price shall be paid according to the plan of distribution and on presentation of the warrants for payment. There has been no "Ordre" settled as yet, there is no evidence to shew that the conditions of sale have been executed, and therefore no right to sue the "Folle Enchère."

Some stress has been laid upon an exparte order of one of the Judges. But there is no doubt whatever that such order has never been intended to decide the present question with regard to the nature of the remedy which is sought to be enforced by the appellants and can have no bearing whatever on the question in issue on this appeal.

Having given it as our opinion, in principle, that no procedure by "Folle Enchère" is permissible except for breach of the conditions of sale, and that such right whether asked by the Indians themselves or whether by parties alleging to be subrogated to the rights of Indian laborers cannot be upheld; we think it unnecessary to decide whether assuming parties to be legally subrogated into the rights of Indian laborers, such subrogation gives them the right of claiming by the same mode as that traced out for the Indians, by art. 17 of Ord. 15 of 1852.

The consideration of this question could not have any influence on our decision.

The Judgment of the Court is that the appeal of the Master's Decision is dismissed, with costs against the Appellants.

SUPREME COURT.

RIVIÈRES,—COURS D'EAU,—SOURCES,—PROPRIETÉ PUBLIQUE,— SERVITUDE,— BARRAGE,— PRISE D'EAU ET PASSAGE SUR LES TERRAINS INTERMÉDIAIRES.

Le droit de passage d'une prise d'eau sur les terrains intermédiaires, accordé aux Riverains par l'Art: 15 de l'Ord: 35 de 1863, implique le droit de prendre la prise d'eau sur le terrain d'un riverain supérieur.

Le lit et les bords d'un cours d'eau public sont propriété publique, et les riverains ne peuvent, en invoquant leurs droits de propriété, s'opposer à ce que l'on y élève les travaux jugés nécessaires par l'autorité compétente pour fournir à un riverain inférieur la part d'eau à laquelle il a droit.

L'on entend par le bord d'une Rivière cette partie de la rive qui est submergée lorsque les eaux s'élèvent à leur plus grande hauteur, hors le cas de debordement.

L'orsqu'une source crée un cours d'eau qui, suivant sa pente naturelle, tombe dans une rivière ou à la mer sans sortir de la propriété où se trouve la source, ce cours d'eau et son lit sont propriétés privées. Mais lorsque le cours d'eau traverse plusieurs propriétés avant de se jeter dans la rivière ou à la mer il devient propriété publique.

L'Ord: No. 35 de 1863 a interprété et non abrogé les Art: 641-644 et 645 du Code Civil.

RIVERS,— RUNS OF WATER, — SPRINGS, — PUBLIC PROPERTY, — SERVITUDES, — DAMS,— "PRISE D'EAU" AND PASSAGE THEREOF ON INTERMEDIATE LAND.

The right of passage over any intermediate land, conferred on borderers by Art: 15 of Ord: No. 35 of 1863, necessarily implies a right to a "prise d'eau" on the property of a superior borderer.

The bed and banks of a public stream are public property, and works made in such public streams cannot be resisted on the ground of their being an infringement of the rights of the borderers.

The banks of public rivers and streams are public property but to the extent only at which they form part of the stream, that is comprising that portion which is covered when the water is high without over flowing.

When a spring creates a stream which, following its natural course, falls into a river or into the sea within the oundaries of the property from which it has risen, the bed of such stream is private property and like the water which flows into it belongs to the owner of the land. But when the stream has crossed over several properties it becomes public property.

Ord: No. 35 of 1863 has interpreted and not abrogated Art: 641-644 and 645 of the Civil Code.

DESPEISSIS,—Plaintiff,

versus

CARCENAC & ORS,—Defendants.

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Before

His Honor the ACTING CHIEF JUDGE, and
The Honorable Mr. JUSTICE ARNAUD.

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J. COLIN,—Queen's Advocate.

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L. CHASTELLIER,—Of Counsel for Plaintiff.
E. SAUZIER, —Plaintiff's Attorney.
E. LECLÉZIO, L. ROUILLARD, } Of Counsel for Defendants.
E. J. LECLEZIO, V. BOULLÉ, } Defendants' Attornies.

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13*th November* 1867.

* This is a case referred to this Court by the Executive Council sitting as a land Court.

The facts are as follows;

Despeissis, a borderer of the "Rivière du Tamarin," prayed, in March 1867, for the division, among the borderers, of the water of that river.

The partition was made, and a portion of water was allotted to the Plaintiff, and the Surveyor General in his Memorandum of distribution suggested that that portion of water should be taken at a certain specified point. It so happens that the spot so pointed out is at a certain distance from the land of Despeissis, who petitioned the Land Court that he might be allowed to take his water at the point selected, and to bring it to his land through the intermediate lands of the Defendants, upon payment of a fair compensation, in pursuance of Art. 15 of Ordinance No. 35 of 1863.

The above application was submitted to the borderers of the said River, two of whom opposed the granting of Petitioner's prayer. Règnard and Ors., the owners of *Magenta* estate, and Carcenac, the owner of *Walhalla* estate, laid their objections in writing before the Land Court.

The Executive Council sitting as a Land Court has retained some of those objections for adjudication, and referred to this Court the following purely legal question as to the right of Plaintiff to take the share of water allotted to him, at the spot indicated by the Surveyor General, and to take it to his estate thro' the intermediate lands of the two above mentioned estates.

P. L. CHASTELLIER, for the Plaintiff, said;—Despeissis has a right to obtain what he asks; his prayer rests upon the formal text of Ordinance No. 35 of 1863, Art. 15, which expressly says that "any proprietor wishing to have "any water which he may have a right to use or "to dispose of brought to his land for any pur- "pose, may have such water taken thro' any "intermediate lands with the authority of the "Executive Council and upon payment of a fair "compensation, to be previously fixed therefore "by arbitration."

Before the promulgation of the above enactment, Rivers and Springs were private property. This provision withdrawing them from the "*domaine privé*" placing them within the "*domaine public*", is a repeal of Art. 644 and 645 of the CIVIL CODE: again, Art. 5 by providing an equality of rights and principle between borderers repeals the second part of Art 644 which establishes a difference of right between borderers whose property merely borders the River or Stream, and the owner whose estate is traversed by the water. (Yet see Art. 4 of Ordinance.) Again, Art 12 (Ordinance) forbids any borderer taking water from the River without an authority from the Executive.

This is also a departure from the law of the CIVIL CODE. What clearly proves the radical change of system intended by the Colonial Ordinance is the enactment of Art. 21 of the Ord: which treats as public property, springs which, by art. 641 C. C., are clearly private property. CHASTELLIER, however, admits that the preponderance of authorities under the CODE CIVIL is against his pretentions, but adds that even under that CODE there are some authorities in favor of the system advocated by him and quotes

DALLOZ, *Servitudes* No, 275.
DEMOLOMBE, No. 211 and 260.
SIREY, 55-1-78.
DAVIEL. No. 13, page 30.
SIREY, 53-2-21.

E. LECLEZIO, *Junior*, for Règnard and ors.—owners of *Magenta*. Altho', at first sight, the system of legislation of the Civil Code may appear to have been altered, yet an attentive reading of the Ordinance will prove that it no wise modifies the principles laid down in the CODE CIVIL; that the enactments of the Ordinance are so many rules for the more effectually carrying out of the general rule laid down in Article 644, CIVIL CODE.

All the provisions of the Ordinance appear to have been copied verbatim from some of the writers who have written on the Interpretation to be given to the general rule laid down in that article of the Code. Thus Art. 1 (Ord.) by providing that the waters of Rivers are public property does not mean that they are *the property of the* CROWN; but property *common to the borderers*, an opinion consistent with the one expressed by the majority of the writers on this subject and with decisions of the French Courts of law, on the same subject.

Art. 12, 2 and 4 are to be found almost verbatim in French writers.

* The subject matter of this our Decision involving an important question of principle has been submitted to our brother Judge, Mr. JUSTICE COLIN, who concurs with us; it is, therefore, the Judgment of the whole Court.

In the CODE the rights of borderers are equal in character and in principle, *cæteris paribus*. The inequalities being only those arising from the situation of the respective properties having a proportional right to the use of a common property but not until such undivided right has been regulated by the administrative authority.

Art. 5 of the Ord. is nothing more than the adoption, under the form of a legal enactment, of the Doctrine taught and professed in France by writers and Courts of law in interpreting Art. 644, CIVIL CODE.

Article 15 of our Ordinance is the reproduction of Article 1 of the French law of 1845. It creates a servitude, and therefore must be construed strictly. It gives a "servitude" of passage, but not a servitude of "prise d'eau" (de VILLENEUVE. Lois annotées.)

The servitude "*de passage*" is different from the "droit d'appui;" a servitude which was created in France by the law of 1847 and in our Ordinance by Art. 18.

Cites DEMOLOMBE 2 No. 212
DAVIEL, on the law of 1845 p. 24
SIREY 53. 2. 17
„ 54. 2. 337

L. ROUILLARD, for Carcenac, owner of the "*Walhalla*" Estate. The ordinance contains the provisions which necessarily flow from the principles of the Civil Code. It purports to abrogate a number of decrees and does not mention the CIVIL CODE, thereby leading to the necessary inference that it never intended to abrogate the CODE CIVIL, but only the several "arrêtés" which had been promulgated for facilitating the application of the Code which the new ordinance purports to regulate by its new enactment. The Ordinance is nothing more than an "Arrêté réglementaire" for the better application of the general rule of the Code.

ROUILLARD joined LECLEZIO in the arguments urged by the latter in support of his proposition of the non-abrogation of the CODE.

J. COLIN, QUEEN'S ADVOCATE: The point referred to the Court is one of great importance which makes it imperative upon the Court closely to examine the laws of France and of Mauritius on the ownership, disposal and use of waters Both laws have given rise to much controversy.

The principle of the Code has been asserted and strengthened by the new Ordinance of 1863 and neither repealed, nor modified, nor affected in any wise by that Ordinance, as asserted by the Plaintiff.

Our present water law is the same as that which, under the Code, had the sanction of the French Courts and of the best commentators of the Civil Code.

In France the ownership of non-navigable Rivers, before the Revolution in 1789, gave rise to much controversy.

In Mauritius there was no such uncertainty. Those rivers having been the property of the KING.

But the CODE CIVIL created a new order of things; it was promulgated in 1805. No reservation is therein made as to the rights of the KING over those Rivers and their waters. The Code having provided for the use of waters and remaining silent, however, as to the ownership thereof, it was contended by CHAMPIONNIERE and DURANTON that they were the private property of the borderers, PROUDHON, NADAULT de BUFFON, RIVES and DUBREUIL, maintained that they are within the "domaine public," whilst TROPLONG and the COURT of CASSATION held them to be "*res nullius.*"

In Mauritius, however, no such uncertainty can possibly exist on the ownership of our colonial waters. These, with us, form a part of the "domaine public," and as such imprescriptible and unalienable, very different in this respect from CROWN property which is prescriptible and alienable.

By so placing the waters of rivers and public streams within the "domaine public," the Ordinance has introduced no new principle and still less as it made any transfer from the private to the public domain which, without an adequate indemnity, would have been an abuse of power.

It has merely sanctioned, by a legislative enactment, and placed beyond doubt, that which would have been much disputed amongst us, without the interference of our local Legislation.

So much as to the ownership of Colonial Waters.

In reference to the use of those waters, the Ordinance of 1863 has made no innovation, but given a legislative interpretation of Arts. 644 and 645, similar to the one given as to the meaning of equality of rights by MARCADE, DUBREUIL, HENRION DE PAUSEY, PARDESSUS, MERLIN, *Cours d'Eau* § 8; such an interpretation as given of the prohibition of damming a River without an authority from the competent authority, by ESTANGEN, NADAULT DE BUFFON and SIREY, 64.2. 270. Further Art. 645 itself submits the use of the Waters of Rivers to the control of the "réglements d'eau." The alleged discrepancy between the Ordinance and the Civil Code has no existence whatever.

Art. 15 is the translation of Art. 1 of the French law of 1845, and by that law the "servitude of passage" implies the servitude of "prise d'eau," without which the "servitude de passage" would be nugatory.

Such was the opinion of the legislators who framed the law of 1845. (Read the debates before the Chamber of Deputies.) The preponderance of authorities and the jurisprudence of the French Courts is in favor of that conclusion, and the authorities apparently leading to an adverse opinion, on close examination, however, proved not to be in point.

Moreover the argument of the Defendants that Art. 15 gives a right of passage and not a right of "prise d'eau," implies a pretention to the ownership of the banks of public Rivers. They have no such right. The bed and banks of such Rivers are public property as well as the water itself. A distinction is, however, to be made between the beds and banks of Streams which are public and those which are private property, such as the beds and banks of Springs, Streams, which by Art. 31 of Ordinance 35 of 1863 are private property unless they are the sources of puplic Streams.

But when is a spring stream private property and when does it become public property is an important question.

When a spring generates a stream which runs into a River or the sea on the property where it rises, it has been from time immemorial held to belong to the owner "*cili ex fundo nascitur.*"

But when following its natural course it flows thro' the land of others to reach the River or the Sea, the inferior borderers have a right to the use of that water. This community of interests changes the character of the stream and gives it that legal character of publicity which brings it within the provisions of Art. 664, C. C.

In this last case the bed on which such water flows is within the public domain, unless by ancient titles and before the Civil Code, the banks and beds of such runs of water have been conceded. (Arrêt. 14 Vend., An 13, Ord. No. 18 of 1841, Ord. 30 of 1854.)

Therefore, in granting the plaintiff authority to take his water above the boundaries of his property, works necessary for the "prise d'eau" will rest not on private but on public property;

Therefore, concluded the QUEEN'S ADVOCATE, Despeissis is fully entitled to take his water on the superior borderer's estate at the spot indicated by the Surveyor.

JUDGMENT:

This question borrows much of its importance from the line of argument adopted by Counsel on both sides. The learned Counsel for Despeissis urges the Court to a Decision in favor of the Plaintiff, on the ground of the radical change which he alleged to have been introduced by Ordinance No. 35 of 1863, in the law which, up to the promulgation of the Ordinance, regulated the ownership and use of our Colonial waters, asserted the repeal of Art. 641, 644 and 645 of the Civil Code, and repudiated as inapplicable to the present state of things, the authorities and Decisions of the French Courts, based, as they are, upon the alleged repealed enactments of the Civil Code.

On the other side, the Defendants' Counsel denied both the existence of the alleged repeal and the fact of the local legislature having ever contemplated and intended any departure from the enactments of the Civil Code.

Practically, therefore, the issue they have raised comes to this: have the enactments of the Civil Code having reference to the ownership and use of our Colonial Rivers and Streams been repealed or in any way modified by the promulgation of Ordinance No. 35 of 1863.

We are clearly of opinion, 1st. That the provisions of Ordinance No. 35 of 1863, have not modified and still less abrogated Articles 641, 644 and 645 of the Civil Code, the fundamental law of the land.

2ndly. That the new Ordinance is nothing more than a legislative interpretation of the principles laid down in those articles, the application of which had given rise in France to much indecision and controversy, which evil, our Colonial legislature has partly remedied.

In support of the non-repeal of the enactments of the Civil Code, we notice first of all that the Ordinance which formally does away with a certain number of local Ordinances, Decrees and Proclamations does not, in any term, abrogate any portion of the Civil Code, thereby leading to the logical inference that such abrogation was not intended.

Are the enactments of the Ordinance so contradictory of the principles of the preexisting law as to preclude the possibility of reconciling the two laws in their application, which would lead to the inference of the abrogation of the article above cited of the Civil Code.

Unless supported by enactments clearly conveying such a contradiction, we should not feel ourselves warranted in disturbing principles on which rest important rights, and such contradiction we have not found.

The difference in the wording of the Ordinance when compared with that of the Civil Code is easily explained; the Code lays down general principles only, and those on the matter now under consideration are to be found in two articles. The application of those principles has given rise to a great division of opinions among French writers and Courts of Law, for the last fifty years.

The provisions of the Ordinance shew that the object contemplated by that Ordinance was to put an end to all such controversies for the future.

The Ordinance adopts the general principles of the Code, and its first twenty-four enactments provide for the application of those principles.

These provisions far from contradicting the principles of the Code, are each and all of them based on opinions of commentators and Decisions of Courts delivering what they considered to be the correct application of the principles of the Code, on those controverted questions.

A summary review of those enactments will illustrate the correctness of this conclusion.

Art. 1.—Provides that, with the exceptions to be hereafter mentioned, all Rivers and Streams are public property and are in the "domaine public."

This Article disposes of the doubtful question of ownership as to runs of water bearing a public character from the rights enjoyed in common by their borderers, a question left by the Code to be inferred from the provisions regulating the use of their waters and which gave rise to much controversy. Some contending that Rivers were the private property of the borderers, and others that they were "*res nullius*" and as such forming part of the "domaine public" The Ordinance has adopted the latter conclusion which is the opinion of the "COUR DE CASSATION" (S. 46.1,433) and of a considerable number of commentators of the highest Order such as PROUDHON, MERLIN, NADAULT DE BUFFON, RIVES &c

Art. I. Of the Ordinance is therefore simply declaratory of what was the law under the Civil Code at the time of its promulgation, and in adopting the conclusions embodied in that Article 1, the legislature was justified not only by the authorities who have written and decided under the CODE, but by our own precedents which freed the question from many of the difficulties existing elsewhere.

In the Colony, and previous to the French Revolution, the ownership of non navigable Rivers had been claimed by the state, and although that right, which by the Land Court (Séance du 29 Mars 1832) is called "un droit primitif et singu-"lier que l'Etat s'est attribué," appears to have been exercised in one solitary instance (viz:) the diversion of the "Rivière des Pamplemousses" and of the "Rivière des Citrons" for the wants of the Powder Mill, yet in as much as such right was consistent with the law of the land at the time the "coutume de Paris," we are bound to consider that the ownership of non navigable Rivers was claimed as one of the feudal prerogatives of the Crown of France.

Between the abolition of Royal authority in France, as well as in Mauritius, and the Empire, a space of time elapses within which all remnants of feudal prerogatives had disappeared and non navigable Rivers, in the words of the Court of Cassation, fell "dans la classe des choses qui "n'appartiennent à personne, dont l'usage est "commun à tous et dont la jouissance est reglée "par des lois de police" (S.7-1-185.)

By the promulgation of the Civil Code at Mauritius, in 1805, without any modification in its text in the Arrêté Supplémentaire, the general principles laid down by the Civil Code subjecting the use ("Jouissance") of public runs of water to the supervision and control of the Executive has been and continues to be the law of the land.

We have dwelt upon the meaning of Art. 1 of the Ordinance because it appears to us that all the enactments of that Ordinance, with the exception of Art. 15 when compared with the Civil Code, bear the same character, most of them may be traced in French Jurisprudence and text books as conveying a correct interpretation of the principles of the Civil Code.

Thus, for instance, the prohibition of Art. 2 and 24 of the Ordinance are based upon reasons mentioned in NADAULT DE BUFFON, page 55: "Si la construction des barrages était lais-"sée libre et facultative à chacun, l'usage abusif "qu'on en ferait causerait bientôt les plus graves "perturbations dans les eaux courantes," and upon the Authority of an "Arrêt" of the Cour de Cassation. SIREY 34,1.74.)

Again, as to *equality* between borderers, as meant by the CODE, the reading of the "Arrêt" of the Cour de Cassation, (SIREY 7. 1. 185) and of most writers show that Art. 5 of our Ordinance has introduced no new principle.

It is further to be remarked that many of the provisions of our Ordinance are so many transcriptions of the Administrative enactments promulgated in France for the application of the CIVIL CODE.

"L'eau des Rivières non navigables est com-"me l'eau des Rivières navigables, une propriété publique. Ce titre a deux acceptions; par "l'un on entend une propriété *Nationale*, et par "l'autre une propriété *commune*. Cette deu-"xième acception est applicable à tous les cours "d'eau non navigables, flottables, qui ne sont "pas une propriété privée. Ces choses sont les "Rivières et ruisseaux qui traversent plusieurs "héritages, plusieurs communes." (CODE ADMINISTRATIF, FLEURIGEO. Vol. 2, p. 257.)

Having thus shown the consistency of the enactments of our Ordinance with the principles laid down in the Civil Code and the value of those Colonial enactments for the more efficacious carrying out of the principles of the Civil Code in reference to water in general, we now turn our attention to the much narrower point which forms the issue under immediate consideration.

Art 15 provides that a borderer may have his share of water brought to his land by taking it through any intermediate land.

The enactment is partially a translation of the French law of 1845.

It is contended for the owners of *Magenta* and *Wallalah* that the word *intermediate* does not apply to any land separating the water from the land of the petitioning borderer, but that which lies between two portions of land belonging to one and the same proprietor.

The borderer thus taking his share of water on his land next to the River is empowered to take the water through such intermediate land to his land, for, all the law intended to give such borderers was a mere "servitude de passage" but not a "servitude de prise d'eau." The learned Counsel quoted two Decisions of the Courts of MONTPELLIER AND ANGERS, and an "Arrêté" of the COUR DE CASSATION. SIREY 55, 1. 446.

We are not satisfied that the last Decision delivered in the same case as that of the Court of ANGERS has decided the question of law such as it has been submitted for our consideration.

Be it remarked that by the law of 1845, the question whether a party is or is not entitled to the benefit of a servitude of "prise d'eau" is to be decided by the Courts of law, on the merits of each Application, and the Court, like the Land Court, here, is empowered to refuse the servitude, if, from the facts of each case, they think it would work an injury to the rights of the superior borderer; and the "Arrêt" of the COUR DE CASSATION in the case of *de Couësbone*, rests on two points of fact:

1o. That the prayer of *de Couësbone* would deprive the superior borderer of his full rights on the Stream in question. 2o. That parties had settled for more than 30 years the mode of using such water.

This "arrêt," in no wise, bears out the meaning which the Defendants seek to attach to the word *intermediate*.

Again, the Decisions of the Court of Cassation delivered in cases also not in point, however, led to an adverse conclusion. Such is an "arrêt" of the COUR DE CASSATION of 1857; (SIREY 59.1. 500.) Whilst commentators of the highest merit have given opinions clearly contradictory to the opinion of the writers cited in favor of the Defendants. DEMOLOMBE *Servitudes*. No. 211, DAVIEL on the law of 1845.

In presence of such conflicting authorities to come to a sound and satisfactory conclusion, we must fall back on our Ordinance constructed in connection with the rules of the Civil Code.

We think that the right of passage over any intermediate land, necessarily implies a right to a "prise d'eau"; without which such right of passage would be, in most cases, useless. If an inferior borderer is to carry his share of water thro' any intermediate land lying between his estate and the River, he must necessarily be entitled to take that water, provided that in doing so he does not injure the rights of his co-borderers.

We are further of opinion that the bed and banks of a public stream are public property, and that works made in such public streams cannot be resisted on the ground of their being an infringement of the rights of the borderers.

But when is a stream or run of water public in law? To ascertain this a distinction must be made; when a spring creates a stream which following its natural course falls into a River or into the sea, within the boundaries of the property from which it has risen, the bed of such stream is private property and like the water which flows into it belongs to the owner of the land. But when a stream following his natural course falls into a river or into the sea after having crossed over several properties, it becomes common to the owners of such properties, takes from such community the legal character of publicity, and is public property: Such are the provisions of Art. 21 of Ord. 35 of 1863 combined with Art. 641 of the CODE CIVIL. That the beds of public streams are not the property of the borderers must be inferred from Art. 563 of the Civil Code, which provides that when a River, even non navigable, shall change its course and flow on the land of other people the latter shall be entitled to take the forsaken bed as an indemnity, clearly demonstrating that in the spirit of the Code such bed is not the property of the bordering landowners, and therefore falls in the category of things which are *res nullus*, as such within the public domain and under the keeping and control of the Executive.

* But we must add, as to banks, that they are public property, but to the extent, only, at which they form part of the stream, that is comprising that portion which is covered when the water is high, without overflowing. (SIREY 43.215. DEMOLOMBE 9) Banks and beds of a public River or Stream, being public property, none of the borderers have any right to oppose the granting of a "prise d'eau" by the Executive, so long as they are left in the full undisturbed enjoyment of their share of water.

We think that Art. 15 confers upon the lower borderer, a right to ask that a servitude should be established for taking and conveying his share of water thro' the land of the higher borderer; that the law has contemplated that such servitude should be granted in conformity with the general rule of the Civil Code, on the use of public waters, which says: "Les tribunaux, en prononçant, doivent "concilier l'intérêt de l'agriculture avec le res- "pect dû à la propriété privée."

And, further more, that when such servitude is due, regard must be had, in fixing upon the spot where the necesary works for the "prise d'eau" are to be made, to the law on servitudes.

Upon the whole, should Despeissis satisfy the Executive, sitting as a Land Court, in point of fact

1stly. That the granting of his prayer is in the interest of the agricultural purposes of the Plaintiff, in conformity with Art. 645 of the Civil Code,

2ndly. That at the point suggested by the Surveyor General, a servitude of "prise d'eau" can be established consistently with Art. 683 681 of the Civil Code,

We are of opinion that under Art. 15 of Ordinance 35 of 1863, he would then be entitled to obtain at the hands of the Land Court, the servitude of "prise d'eau" prayed for.

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* We do not consider that it is possible to separate the banks from the bed; and we hold, therefore, that the banks and beds of public rivers and streams form part of the public domain.

SUPREME COURT.

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CHEMIN DE FER,—INDEMNITÉ,—DOMMAGES.

Circonstances d'après lesquelles la Cour a décidé que le dommage survenu à un immeuble, par suite des travaux du Chemin de fer,—et postérieurement à l'indemnité accordée au propriétaire de l'immeuble par les experts,—ayant été prévu et ayant servi de base pour fixer le chiffre de l'indemnité, ne pouvait motiver une action en dommages contre le Gouvernement.

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RAILWAYS,—INDEMNIFICATION,—DAMAGES.

Circumstances under which it has been found by the Court that the Government was not answerable for a certain damage which occurred to an immoveable property, on account of the railway work,—and subsequently to the indemnification awarded to the owner thereof by the Railway Commissioners,—such Commissioners having foreseen and taken into account the damage complained of.

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WIDOW MERCIER & ANOR,—Plaintiffs,

versus

C. J. BOYLE,—Defendant.

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Before:

His Honor Mr. JUSTICE COLIN, and
His Honor Mr. JUSTICE ARNAUD.

—

J. L. COLIN, —Of Counsel for Plaintiffs.
E. LAURENT, —Plaintiffs' Attorney.
S. J. DOUGLAS,—Of Counsel for Defendant.
J. BOUCHET, —Defendant's Attorney.

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8th November 1867.

This was an action brought by the Widow and Heirs of the late William Mercier, to recover from the Defendant, in his capacity of Chief Commissioner of *The Mauritius Railways*, and acting in such capacity on behalf of Her Majesty's Mauritius Colonial Government, the sum of eight thousand pounds sterling, as damages, under circumstances set forth in the Declaration.

The Plaintiffs alleged that the estate of the late William Mercier was the owner of an immoveable property situate at Port Louis, "Passage Monneron," which property had been converted into a Dock and Warehouse at a great deal of trouble and expense previous to the decision taken by Government that Railways should be established, and that the central terminus should be established close to the said property.

That as soon as it became known that the "Pouce" and "Butte à Tonnier's" rivulets were to be diverted from their natural course, the owners of the neighbouring property felt great apprehension, and Petitions and Reports were sent in to point out the danger to which such property would be exposed by the overflowing of the two united rivulets. That the above mentioned property of the late William Mercier was more exposed to danger, because the two rivulets operated their junction at the corner of the late W. Mercier's property and the works made for that purpose left no sufficient egress for the enormous quantity of water which comes down the two rivulets during the rainy season; and because, just opposite Mercier's stores, a sharp curve had been given to the canal which tended to retard the flow of the waters, and raised the level thereof.

That the Plaintiffs, in anticipation of the loss and prejudice to be caused thereby, had written officially to the Defendant, on 8th April 1864, to express their fears. That in spite of the warning thus timely given, the Defendant carried on the Railway works and caused the two rivulets aforesaid to be united at the corner of the late William Mercier's property.

That the Defendant further caused the Creole's rivulet to be joined to the two already mentioned streams, some distance below the stores of the late W. Mercier, thereby increasing the quantity of water which was to flow through the main canal and thereby hindering *pro tanto* the escape of the waters of the other two streams now united into one, forcing them back to a great extent and raising their level.

That on 12th February 1865, there was a very heavy fall of rain, and the waters pouring from the mountains and the upper part of the town, came down with great violence to the point of junction of the two first mentioned streams at the corner of W. Mercier's property. That the water coming down from the Creole's Rivulet not finding sufficient egress by the main canal, checked the flow of the waters of the two first mentioned streams, forced them back, and accumulated them at the very corner of late Wm. Mercier's property.

That the Defendant had caused a wall 400 feet long, 6 feet thick and 10 feet high to be built behind the line where stand the railway waggons.

That such wall was built just across the natural course of "Pouce" and "Butte à Tonnier's" rivulets and on the very place of their former junction and tended to stop the waters and accumulate them at the place of junction now existing at the corner of the late Wm. Mercier's warehouse.

That the Defendant further caused the "Passage Monneron" to be shut up by a wooden railing close to Wm. Mercier's property, and "all the waters with their accompanying matter," in the very words of the Declaration, coming down from the "Passage Monneron" being hereby obstructed, did flow into the said property.

That on the 12th February 1865, the property of the said late Wm. Mercier was, on account of the obstructions above recited, completely inun-

datod during the heavy rains which fell on that day, by the overflowing waters of the two rivulets increased by the waters from the "Passage Monneron" and "Créoles" stream rivulets, and an immense quantity of sugar, rice and other merchandise stored by divers persons in the said Wm. Mercier's stores, were either totally lost or greatly damaged, and also that two occupiers of the central houses suffered so much that they immediately left the premises.

That the property of the said late Wm. Mercier has been immediately given up by the tenants and cannot, now, be let at any price. Thence the action in damages.

The Defendant, first, demurred to the action, and upon that Demurrer Judgment has already been given by the Court. (Suprà Page 36.)

The Defendant then pleaded, traversing all and singular the allegations setforth in the Declaration.

That the works complained against were necessary for the construction of the two lines of railing, the construction of which has been sanctioned under the provisions of Ord. No. 11 of 1862, and that the said works were made under the provisions of the said Ordinance and with the sanction and approval of the Governor of this Colony, with the advice and consent of the Council of Government.

Further, that on 8th April 1864, the Plaintiffs avering that they were prejudiced by the said works made their claim for compensation, which claim was, under the provisions of the said Ordinance, duly adjudicated upon by commissioners duly appointed under the provisions of the said Ordinance and the said Commissioners did, by their award dated 20th of October 1864, fix the amount of compensation to be paid by Her Majesty's Colonial Government to the Plaintiffs, for damage caused to the said property, by the making of such works, at the total amount of £25,800, which said amount was wholly paid to and accepted by the said Plaintiffs in satisfaction of all such damages.

And further that any damage suffered by the Defendant occurred by the act of GOD and not in consequence of the making of the works in the Declaration mentioned.

The Plaintiffs maintaining the facts set forth in the Declaration, joined issue on Defendant's last pleas.

J. COLIN, for Plaintiffs, laid the facts before the Court and called his witnesses.

HON. S. J. DOUGLAS for Defendant (the Defendant also called witnesses,) urged that:—the precise question at issue between the parties should be put before the Court. (reads the Declaration.) This is a Petition of right, it recites that the Plaintiffs anticipating the prejudice they say they have suffered, expressed their fears in their official letter. My learned friend contended that the damage which did occur could not be anticipated when they went before the arbitrators; but the Plaintiffs disprove this argument by their very Declaration which states that danger from inundation was contemplated and the works proceeded with in spite of remonstrances. The works made were the diversion of "Pouce" and "Tonniers" streams by the "Stanley" cut, which cut debouched in the "Creoles" stream; there was no possible use for the "Stanley" cut, except to carry in the "Creoles" stream the waters of those two streams; we have it proved that this wall of 400 feet was the necessary operation towards making the "Stanley" cut; it was its retaining wall, it was therefore part and parcel of the diversion of the streams contemplated by Government and part of the scheme protested against by the heirs Mercier. The wooden paling was an open paling through which water could flow freely, and the "Stanley" cut was the obstruction, if there was any. The syphon was also part and parcel of "Stanley's" place.

All these are the works considered necessary for the Railway works which Government were authorized to make, subject to making compensation to those who might suffer thereby. I refer to letters of the Heirs Mercier, 8th August 1864, and Art. 20 of Ordinance 11 of 1862. The heirs Mercier claimed damages alleging that they have suffered from inundation on account of those works. We have pleaded, *inter alia*, that upon an award, a sum of £25,800 has been paid by Government to the Plaintiffs; also that the damage was the act of GOD.

It now becomes important to examine the claim made, and the award made upon that claim. I turn to the letter 8th April 1864; after setting forth their right to the property, they say this: "We regret to say we have another cause of complaint" &c. What we have to consider is what was the claim of the heirs Mercier for compensation. The award of the commissioners shows what claims they proceeded upon and determined. The complaint was twofold: the passage stopped, and the danger of inundation; the Chief commissioner ignores one claim but offers compensation for the other.

The whole thing goes before the commissioners, and the letter of Mr. Boyle cannot narrow the claim which was entertained as made in the letter of the heirs Mercier who state in their Declaration that they anticipated danger of inundation. There is no question as to the sufficiency of the works, that they broke down, and therefore damage ensued. The works were properly made. That they exposed the Plaintiffs to damage is possible, though how far this extraordinary inundation is answerable for, is a great question; if we look at Didier's evidence, what took place at his house did not arise from the Railway works, and we have no proof, at a subsequent period, that the stores were inundated. I say that an inundation took place such as never was seen before.

J. COLIN, in reply: The defence rests chiefly on the award of the Commissioners. If I can show that taking the *ratio* of rain that fell in the morning when no one feared a flood, Mercier's store was at that time overflooded, am I not entitled to say that the depreciation of the store was not due

to the exceptional flood ? The Government showed this by restoring things to their original state but during one year the store could not be occupied. As to the award, we must take the whole of it; the first document to be inspected is the letter of the 29th of March (objected to by Douglas and given up by Colin.) In our letter of April to the Commissioners, we allude to the dangers of inundation merely as a contingency, the award takes no notice of such contingency.

We could not sue for damages on account of dangers that had not arisen yet; you had the power to make that cut, we made our reservations and guarded ourselves in case of future floods that we anticipated. At ten o'clock a.m. that day, there was no water in the rest of the town. Our store was inundated and the syphon had ceased to work.

The tide rose at 3 p.m. and had nothing to do with the inundation at 10 a.m. Besides that wall stopped the whole drainage of the town. I refer the Court to the Report of the Commissioners approved by Government and the Municipal Corporation.

JUDGMENT.

Two principal issues arise out of the pleadings in this cause, and to the solution of these two issues the mass of evidence oral and documentary laid before the Court, must be subservient. The first is whether the overflooding of the Plaintiffs' stores and warehouses in "Passage Monneron" street, on the 12th February 1865, was caused by the act of GOD or by the works made by Government for the purposes of the Mauritius Railways. The second is whether, supposing the damage sustained to be attributable wholly or partly to such Railway works, the Plaintiffs have already received compensation under the award of the Railway Commissioners, and are therefore estopped from setting up their grievances anew.

We feel satisfied that the inundation of the 12th February 1865 short lived, but terrific, sweeping down the mountain passes and precipices to the sea with unwonted fury, destructive of property and destructive of life had a great deal, to day, with the damage suffered by the Plaintiffs, but we are also satisfied that the Railway works have played their part, and not an unimportant one in the havoc and waste suffered on that day.

We find here the canals of two streams united into one, and that neither sufficiently widened nor sufficiently deepened to offer to the temporary flood of water which, in a few minutes, turned an unsignificant stream an almost open sewer, as a witness calls it, into a tempestuous torrent; we find the shallow cutting thus made at right angles with the "Pouce" and "Tonniers" rivulets, carried on for several hundred yards, almost on a dead level, until it meets the "Creoles" stream with which it unites.

Such a condition of things, in the words of Dr. Edwards, the Chief Sanitary Inspector, whose evidence we quote, rendered the consequences of a flood inevitable, and might have been anticipated.

In reality this new cut had to carry off almost the whole waters of the "Pouce" Mountains and a great deal, at least, of the surface and under ground drainage of a large portion of this town.

The result was that at 10 a. m., the syphon that was intended to take off the drainage of "Passage Monneron" (Vandermeerch's evidence) had ceased to work, and the water had passed through an unfinished portion of the earthen embankment at the extremity of the stream wall on the right bank; at 11 a. m., the water must have been entering Mercier's stores, whilst by 2 p. m., the water was 2.87 feet above the coping of the syphon well; 1.51 above the plinth or 2.31 feet above the floor of Mercier's stores.

At ¼ before 7 p. m., the cut, "say the Commissioners on the Inundation," was overflowing just above the railway bridge or nearly in its widest part, and the water of the "Creoles" stream was even then damming back the flow of the "Pouce" cut, whilst later in the evening the damming was nearly complete.

After carefully comparing and sifting the evidence laid before us, we think ourselves irresistibly led to the conviction that a good deal of the damage suffered on 12th February 1865, by the Plaintiffs' stores, was caused by the diversion of the streams and inefficient provision found to carry off the watershed and drainage of that part of the town.

No doubt there are, before us, conflicting opinions, and opinions given by witnesses of great experience and ability; but the great weight of evidence is on the side of the views taken by Captain Morrison and those who side with him.

We have no wish to enter into those matters, except so far as they bear upon the issues in this case, and there is, in our opinion, no doubt that owing, in a measure, to the situation near the bend and the sustaining wall, owing also to the extraordinary fall of rain within a comparatively short period of time, but owing also, and owing chiefly, to the railway works, Mercier's stores did suffer and suffer much.

That the chief resident engineers' formulas and calculations are correct, we would readily concede, but formulas however precise, and calculations however carefully made are of no value when applied to or proceeding upon erroneous data. In the applied sciences such reasoning is apparently as sound, but, in reality, as dangerous as, in logic, a syllogism of which the minor premise is false.

The fall of rain of 1861, did not, in those parts of the town quite unaffected by the railway works, produce the results which the flood of 12th February 1865 is abundantly proved to have caused.

The volume of water carried off by the three streams in question, whether because its course was not materially checked, whether it had time to flow on to the sea, the rain lasting longer, but never at any time falling with any thing like the force noticed in 1865, caused no damage from

inundation that could be appreciated, did not certainly mark as an event from its virulence.

The evidence is superabundant (Barclay, Cahagnet and others) that the water, everywhere, rose, on 12th February 1865, as it never had risen before.

If the occurrences of 1861 were the data, or whatever may have been the data upon which this new cut was made, and the auxiliary works executed, we believe them to have been insufficient data; we believe that no proper provision was made for the occurrence of severe hurricanes or a more sudden and heavy flow of water, than had been noticed at a time when besides no obstruction existed to block up and force over the running stream.

But if engineers differ, and calculations vary, the facts remain and are undoubted, and it is impossible to reconcile those facts (*vide* 2. A. KELLEY's evidence p. 27, &c.) with the idea that the damage caused ought to be attributed to the Railway work.

We are therefore brought to this conclusion that if the extraordinary fall of rain which took place on the 22th of February was, in part, the cause of the damage complained of, the Railway works are also and mainly the cause of such damage. We must, therefore, decide that issue against the Government.

But, another point, a very important one, remains to be decided: Government pleads that such damage was anticipated by the Heirs Mercier who spoke of it in their claim for damages, and obtained damages for it, as for other matters also complained of, at the hands of the commissioners appointed.

We find that on the 8th of April 1864, the Plaintiffs, by Mr Arthur Edwards, their agent, wrote to the Chief Commissioner of Railways. In this very long document the Plaintiffs after setting forth their grievances and complaining specially of the shutting up and destroying entirely a street which is private property and the only egress of an extensive warehouse towards the Harbour, add: We regret to say that we have another cause of complaint, which creates in our minds, and will create in that of every lessee of Mr Mercier's property, a great deal of anxiety. The diversion of the "Pouce" rivulet takes place close to the said property and it is greatly to be feared that during the rainy season when the rivulet will be overflowed, the water overflowing will cause great damage to the goods stored in the Warehouse.

They, then, go on to say that they have established by clear proof that they have been deprived of their private property which is, as it were, destroyed; that a heavy loss and prejudice has been suffered by them on account of such proceedings, and they claim £8,000.

To that letter the Chief Commissioner answers on 22nd August. The answer ignores the part of the letter relative to floods and subsequent damage and offers $7.500 as full compensation for the loss of the passage.

The tender being declined, the parties are referred to certain Commissioners appointed by the Governor, under Ordinances No. 57 of 1860 and 11 of 1862.

Those Commissioners signed and published their award on the 26th October 1864.

The award sets forth that the Commissioners have had before them the above mentioned letter of 8th April 1864, stating the reasons of their (the Heirs Mercier) claim of £8,000 for the damages caused to the property of the late Mr. Mercier by the works and constructions required for the purposes of the Railways now in course of execution in the Colony.

The answer of the Chief Commissioner (22nd August) offers $7.500. That the Commissioners heard witnesses and the parties, and they in virtue of the powers conferred by the said Ordinance fix and determine that the amount of compensation to be paid by the Governement to the Heirs and Representatives of the late W. Mercier, for the damages caused to their said property, shall be of the total amount of $25,800.

That amount was paid to and received by the Plaintiffs. It is contended that the present claim could not be contemplated, and in fact, formed no part of the memorial sent in for compensation.

We must judge of the award by the terms of the award and by the light of the documents upon which it proceeded.

It, unfortunately, does not give reasons to guide us; nothing from which we can surely gather what the Commissioners intended to do and for what specific claims, if any, they granted the indemnity which was awarded. It is evident that such an award could not be expected to give an exposition of the law applied; but it might, as is often done here and found elsewhere, explain how direction, if any, were to be construed, to be worked or intended to be carried into effect, what points were dealt with, what claims ignored or reserved. But, there is nothing of all that in the award or in any reasons given or notes made by the arbitrators; we must, then, presume that the Commissioners took into consideration every thing that was submitted to them; Mr Boyle's letter could not possibly narrow the limits of the memorialists claim, unless assented to. The Memorial would, as usual, be taken as a whole, subject to the power vested in the Commissioners, as arbitrators, to decide, if necessary, that one claim was borne out another prematurely brought or foiled altogether.

If the memorial be taken altogether, the main grievance is that a certain way of egress is taken away from the Plaintiffs; but there is a secondary grievance: your works are so constructed that our store is in great danger of inundation in case of heavy falls of rain. Why and on what ground shall we presume that the Commissioners in awarding the very large sum of $25,800 intended to give an indemnity merely for the inconvenience arising from the loss of one passage out of two? The only reason would be that the flood which

caused the actual damage had not taken place, but it was foreseen and the damage anticipated.

We must, mark this, there is no proof in this case of goods lost by the Heirs Mercier or by others to which they have been answerable for the value thereof; the damage is that, for some time, the stores were not let and that the value of the property has decreased. (Whether it has decreased in a greater ratio than all other town real property is not shown.) Now, this is important, for, if the Commissioners would have great difficulty in anticipating the extent of any possible damage to goods and merchandize, they had much less difficulty, in fact, very little difficulty, in determining the possible damage arising from the yearly deficit caused by the stores remaining unlet, or by their decreased value through an inundation wholly or partly caused by the Railways works. In fact, their attention was directly brought to this, and in our opinion the very large indemnity granted, $25,800, is more easily reconciled with the award proceeding upon the grievance of a passage being stopped up and also the danger of inundation causing loss and thereby frightening away future tenants, than upon the bare grievance of the intercepted passage.

This is so true that from the day of the claim made to the day of the flood, and the outlet must have been intercepted before, since they speak of works made, not works to be made, the stores and house did not cease to be let. Brodie left after the flood. The "Albion Dock" was still hired on the 12th February. Are we to assume that as the mere closing of one passage, which did not cause any reduction of rent or the losses of one tenant, the Commisioners would have given $25,800, as an indemnity, when nothing in the reasons given, nothing in the course of the proceedings, and that we repeat would have thrown great light in the matter, leads us to this assumption, and when there was pointed out to the Commissioners, as part and parcel of the causes of indemnity, the fact of the peculiar works executed, the danger arising therefrom to proprietors and tenants?

We are of opinion that this plea of the Crown must be sustained, and we give Judgment for Defendant, with costs.

SUPREME COURT.

TRANSCRIPTION,—INSCRIPTION,—HYPOTHÈQUE LÉGALE, PARTAGE,—PRIVILÈGE DES CO-PARTAGEANTS,—NOTAIRE,—FRAIS DE PARTAGE,—ARROGATION IMPLICITE,—HÉRITIERS SOUS BENÉFICE D'INVENTAIRE,—APPEL D'UN JUGEMENT DU MASTER:

Le mineur émancipé par mariage n'est pas tenu d'inscrire son hypothèque légale, dans l'année de l'émancipation, sur les biens de son tuteur, comme le mineur est tenu de le faire par l'Art. 10 *de l'Ord. sur la Transcription* (36 *de* 1863) *dans l'année qui suit sa majorité.*

Les dispositions du Code Civil ne peuvent être abrogées que par une disposition spéciale et distincte de la loi nouvelle, et non implicitement.

Des héritiers sous bénéfice d'inventaire ne perdent point leur qualité pour s'être présentés dans un procès sans protester contre le titre d'héritier pur et simple qui leur a été donné, alors, surtout, qu'ils n'ont fait aucun acte pouvant leur faire perdre leur qualité.

Lorsque des co-partageants ont perdu leur privilège pour ne l'avoir point fait inscrire dans les délais prescrits par la loi, le privilège du Notaire, pour les frais du partage, subit le même sort, s'il n'a pas été inscrit dans le même délai.

TRANSCRIPTION,—INSCRIPTION,—LEGAL MORTGAGE,—PARTITION,—PRIVILEGE OF CO-PARTITIONERS,—NOTARY,—COSTS OF PARTITION,—EMANCIPATED MINOR,—GUARDIANSHIP,—IMPLICIT ABROGATION OF LAWS,—HEIRS UNDER BENEFIT OF INVENTORY,—APPEAL FROM A JUDGMENT OF THE MASTER.

A minor woman, emancipated by marriage, is not bound to take inscription within the year following her marriage, as she would be bound to do, after reaching her legal majority, conformably to Sect. 10 *of Ord. No.* 36 *of* 1863 *on Transcription.*

Whenever it is intended to modify and change the dispositions of the Civil Code, the New Ordinance shows a distinct enactment to that effect, but the fundamental law of the land cannot be implicitly abrogated.

The Heirs under benefit of inventory, who have appeared without protest in a suit where they had been qualified simply as heirs, have not, on that account, lost their right of heirs under benefit of inventory, especially when they have done none of the acts which, by the penal condition of the law, could change their position of heirs under benefit of inventory to that of heirs simply such.

When co-partitioners have lost their privilege for having neglected to inscribe it within the delays prescribed by law, the privilege of the Notary, for the costs of partition, is submitted to the same fate if not inscribed within the same delays.

BOULLÉ,—Appellant,

versus

RAOUL & ORS.,—Respondents.

Before:

His Honor G. B. COLIN, ACTING FIRST PUISNE JUDGE, and
His Honor L. ARNAUD, ACTING 2ND PUISNE JUDGE.

J. COLIN, —Of Counsel for Appellant,
V. BOULLÉ, —Attorney for same,
L. ROUILLARD, G. GUIBERT, } Of Counsel for Respondents,
P. E. DE CHAZAL,—Attorney for same.

13th December 1867.

The Appellant, in this cause, complained of a decree of the Master of this Court, made on behalf of Loïs Raoul and Mrs Fontenay, whose respective collocations, in the scheme of distribution by way of an "ordre" of the Estate *Belle Ile* situate at "Black River," had been maintained by such Decision.

The Estate *Belle Ile* which belonged to the late Henry Viader and his wife, had been, at the death of Henry Viader, sold by Licitation and purchased, on the 29th October 1861, by the Widow Viader who sold, on the 3rd March 1863, two thirds of the same to Maigrot and Lemerle; Maigrot and Lemerle not paying the purchase price, were forcibly ejected, and the Estate, put up again for sale, was, on the 23rd of February 1865, adjudicated to Victor Boullé, Attorney, who made a "déclaration de command" in favor of Aristide Boullé, for the sum of $25,005.

The Order was opened, a ventilation took place for the Distribution of the price of *Belle Ile* proper and the *Collet* Estate which had been united to it; the Appellant Boullé was collocated on the *Collet* Estate, but that collocation did not cover the whole of his claim, the balance of which, *i e* $3000, he attempted to have collocated on the price of *Belle Ile* proper. That collocation, the Master refused to allow, preferring to the Appellant's claim that of Raoul for $942, and that of Mrs. Cadet Fontenay for what remained of the purchase price, *i.e.* $1,938.

It is necessary to state for the understanding of this case, that a deed of partition took place on the 1st of May 1863, homologated on the 9th of June 1863, between Widow Viader and her children; Henry Viader and Mad. Fontenay were then minors. According to that deed of partition, Mad. Viader was to have $20,723; Henry Viader $2,565; Mad. Fontenay $2,565 and Raoul $942 for dues and costs.

The Estates had been sold, as above described, to Maigrot and Lemerle, from whom Boullé claimed, for advances by him made, a hypothec which was inscribed on 21st May 1863. Mad. Fontenay, (Miss Viader) married 29th August 1863, and inscribed her hypothec on 23rd September 1865. She was still under 21 years of age, but married. Raoul took his inscription on 29th June 1863. Widow Viader gave her account of guardianship to Mrs. Fontenay, her daughter, on October 30th 1866, acknowledging herself to be her debtor in a sum of $565; the sum of $2000 having already been delegated to Mad. Fontenay, on the day of the sale to Maigrot and Lemerle; delegated, but not paid, however.

It was admitted, on all sides, that the minors Viader have lost their privilege as co-partitioners, as no inscription was taken, on their behalf, within 45 days after the sale; and as the law provides that when a partition takes place (and the Licitation of 29th October 1861 was a partition of the particular Estate sold) the co-proprietor who purchases or to whom is allotted the Estate held in common, is held to have always been sole owner of that Estate. But a question still arose; altho' the minors had lost their privilege as "co-partageants," had they not still a right of privilege, as *minors*, over their mother's their legal guardian's property; and if so was Mrs. Fontenay bound to inscribe her hypothec, because she married during minority and became emancipated by such marriage?

As to Raoul the other successful claimant, could he claim more than the rank given him by his inscription of hypothec which was posterior to Boullé's, subject to his claiming by attachment, or otherwise, the amount due to him out of the minor's share, if the minors were his joint and several debtors.

J. Colin, for Appellant, after opening the facts above recited and laying down that it would be admitted, for it could not be gainsaid that the heirs Viader had lost their privilege as *co-partageants*, argued that altho' Mme. Fontenay might be a creditor, her claim was not preferable to that of the Appellant, since it was inscribed after that of the Appellant. There is now no need to trouble the Court as to the heirs Viader who are minors, we say that Mme. Fontenay has lost her privilege. When the sale took place in 1865 she ought to have inscribed her privilege within 45 days after transcription; I go upon section 6 of Ord. 35 of 1863. Mme. Fontenay answers that she was a minor and that her legal mortgage still existed on the 2|3rds of the estate sold to Maigrot and Lemerle, and as such she comes in with her privilege untouched; to that we reply: you may have been a minor but you have married and by your marriage there have been a cessation of the tutorship in August 1863; now you were bound, to save your privilege, to inscribe within one year after the cessation of such tutorship; that you have not done; a married woman can take, if separated, all conservatory measures. At any rate the mother has ceased to be a guardian, and given in her account of tutorship, and the child is only an ordinary hypothec creditor.

Troplong *Transc*: p: 357, No 309.
Dalloz. Do.

My second point is that Mad: Viader is discharged, as to her daughter, as to $2,000 at least; that sum is due by Maigrot and Lemerle, there has been novation. As to Raoul he has collocated himself in the deed of partition, that is so far right as to give a claim, but that gives no privilege, if no privilege existed before. Now the privilege of the "co-partageant" is admitted to have lapsed, Raoul is an ordinary mortgage creditor and his inscription is posterior to ours.

G. Guibert, for Mrs Cadet Fontenay. I admit that my client has lost her privilege as a "co partageant"; but she has another privilege, that which arises out of her legal mortgage. It is alleged that she has lost it, but can section 10 of the Transcription Ordinance apply to emancipated minors? The article contains a "déchéance" and cannot be extended, and the words "cessation de tutelle" must be read only with the words having attained maiority.

Emancipated minors cannot do an act which is not reducible.

TROPLONG, cited by my friend, does not examine the case of the emancipated minor, and I rely on :

FLANDIN *Trans.* II p. 651, No. 1828.
PARD. *Pri. & Hyp.* 11, No, 812.
SIREY, 64, 2, 93.

As to the point of novation (he was on that point stopped by the Court) as to Raoul's claim, the minor's claim had been decreased in proportion of the sum given up to him, and he could not take an inscription before the deed of partition had been homologated. If Raoul is not paid at the "Ordre," the children of Mad. Viader will have to pay him and get indemnity in virtue of their legal mortgage.

L. ROUILLARD, for Raoul, followed with the same line of argument.

J. COLIN, in reply : It is attempted to limit the article of the Ordinance, but there are many instances where it must be extended beyond its actual terms.

FLANDIN 11. Ch. 4.
DALLOZ 47, p. 755 *Transcription.*

If the minor dies before he has attained majority, must not his heirs inscribe within the year next following, and why should minors not come within the article, when the tutorship has ceased and he can protect himself ?

The taking of an inscription, is a mere act of administration. A married woman may be a mandatory, why should she not take an inscription? As to Raoul, the homologation of the deed of partition, no doubt, confirms the settlement but creates no privilege which did not exist. There is no special affectation, to him, of the price of *Belle Ile*, nor is the minors' legal mortgage transferred to him. He is a creditor of the minors. he may get perhaps what they are to get, but that cannot advance, in ranking, his claim as a separate one upon the price of the Estate.

JUDGMENT.

This case does not, in reality, offer any serious difficulty ; and out of the large mass of facts laid before the Court, two questions of law arise which go to the root of the respective claims of the contending parties. It is admitted, on all sides, that the minors, and *à fortiori* Mrs. Fontenay who is emancipated by marriage, have lost all privilege as "co-partageant."

The Master's decree as to the privilege of the minors arising out of their legal mortgage on Mad Viader's property, which privilege that Decision has sustained, is not complained of ; but it is contended that Mad. Fontenay became an emancipated minor on the day of her marriage and not having inscribed or caused to be inscribed her legal hypothec within the year following the conclusion of the tutorship, she has lost her privilege, and her mortgage bears date only from the day of the inscription taken. As a matter of fact, if that be the construction of the law, the inscription of Mad. Fontenay's hypothec is posterior to that of Boullé, and therefore Boullé must be ranked first in the scheme of distribution of the sale price of the "*Belle Ile*" Estate.

The plain question therefore is this : is a minor woman, emancipated by marriage, bound to take inscription within the year following her marriage, as she would be bound to do after reaching her legal majority ?

Under the Code she, assuredly, would not be debarred from her right ; has, then Ordinance 36 of 1863 altered the provisions of the CIVIL CODE, as to the legal hypothecs of women emancipated by marriage ? As a rule, whenever it is intended to modify or change the dispositions of the Code, vary or interfere with rights and contracts which Her Majesty's subjects in this Colony, have enjoyed or were bound by for many years, the new Ordinance shows a distinct enactment, and the Court has invariably declined to be led away by ingenious theories or subtle distinctions from the fundamental law of the land.

As a rule, also, under that law as under every known law, when a party has obtained a right arising out of the law or out of a lawful contract, he is not held to have lost such right, unless he can be distinctly brought within the penal conditions of the law, conditions of which the penalty is never extended and which are themselves never extended.

We may quote as an instance the case of *The Heirs Autard*, Heirs under benefit of inventory, and who were held by the Court not to have lost their right of Heirs under benefit, because altho' they had appeared without protest in a suit, yet had done none of the acts which by the penal conditions of the law could change their positions of Heirs under benefit to that of Heirs simply such.

The same law holds good and the same reasoning would be applied to any other right or any other contract springing from or entered into under the provisions of our Codes.

As a rule, then, a minor upon whom the law has confered the privilege of a legal hypothec shall not lose that privilege, except under the operation of some law which could cause it to be lost. It is said here, that minors are bound to inscribe their legal mortgage, under the Ordinance 36 of 1863, within the year after the cessation of the tutorship, and that the tutorship ceasing by marriage, Mad. Fontenay was bound to inscribe her mortgage within one year after her marriage, failing which she comes in simply as an ordinary hypothec creditor.

The words " conclusion of tutorship " are very much insisted upon.

It is, first, to be observed that the law makes no difference between minors emancipated by

marriage and other minors; the case of the first class of minors is not specially contemplated by the law which seems to have enacted one and the same provision for all minors in general.

The object of the law, evidently, is to render the rights of purchasers and creditors more secure by causing legal or occult hypothecs to be registered as soon as practicable without any undue or unfair interference with the rights of married women, minors or interdicts,

The law, therefore, when speaking of widow or divorced wives, uses the words " dissolution of their marriages ; " when speaking of minors, it uses the words " having attained majority " and then the words " conclusion of tutorship."

Now, why should we read the words conclusion of tutorship, which dovetail so well with the words " having attained majority, " apart from those first mentioned words; why should we import a distinction between one class of minors and another class, when the law has made no such distinction, and when the consequence of the distinction would be the loss of a privilege consecrated in favor of a minor by the whole current of our law and judicial authorities?

Read in conjunction with the words " having attained majority, " the words " conclusion of tutorship " have a perfect sense, and require no additional words, no mental exertion for their clear operation : read without the words "having attained majority " which are to be met first, the words " conclusion of tutorship " must be referred to a different train of thoughts not yet found, not subsequently found in the Ordinance. It is plain that the Legislature intended to compel a minor who has become of age to inscribe, but no more ; it is not plain that the Legislature, even indirectly, contemplated the case of a minor who has not attained his majority, but has married, to inscribe sooner than other minors. If such a distinction had been contemplated, it seems to us plain that it would have been clearly pointed out and enacted.

Apart from all authorities on the subject, we should be prepared to sustain the Respondent's rights. But as we have already had, on one occasion, to observe in this Court, the Ord. 36 of 1863 is an adaptation of the new French Law of Transcription ; both the French Law and the local Ordinance are engrafted on the same stock, THE CODES.

FLANDIN, in his commentary on the new French Law, says, Vol. II. 1528 :—

" L'article porte : " le mineur devenu majeur." " Il en résulte que si la tutuelle vient à finir par " l'émancipation du mineur, l'article n'est pas ap- " plicable ; l'émancipation, en effet, si elle relâche " les liens de l'incapacité, ne la fait pas cesser " entièrement, et le mineur émancipé n'a pas " encore acquis l'expérience et la maturité né- " cessaires pour se passer de la protection de la " loi."

Again, 1,526 : " L'article 8 précité parle aussi " de la *cessation de la tutelle*," mais ces mots " n'ont de rapport qu'à l'incapable, et il est bien " évident que lorsque la tutelle vient à cesser " par la mort, la retraite, la destitution du mi- " neur, (Arts. 433, 34, 43, 44) l'incapacité con- " tinuant, le privilège attaché à l'état de minori- " té, ne peut cesser."

In the edition of the text writer, we quote (1861) a good many other authorities are referred to.

The views of the learned commentators have been entirely adopted by the Court of Amiens, in 1864 (*Taupel* v *Grandguiberd* S. V. 64. 2. 93) we do not find any decision supporting a doctrine contrary to that laid down above.

We now come to the second point, that which relates to Raoul's claim of $942. Raoul is collocated in the deed of partition between the widow and Heirs Viader for notarial dues and costs ; the deed of partition has been homologated by the Court, and that places beyond question the right of Raoul against the widow and Heirs Viader. Has he, however, a privileged claim over the sale price of the estate *Belle Ile?* If the minors have a privileged claim, Raoul, their creditor, might have applied to be collocated "en sous ordre" and received payment out of the sums attributed to them ; Raoul has not so applied, and his privilege, if any, stands on its own merits, and its own intrinsic force.

The homologation of a deed of partition gives full force to the deed of partition as to the parties to it, minors or majors ; it is the confirmation by the Court of the proposed scheme of partition and only goes forth, in the case of minors, after the "Ministère Public" has given his conclusions.

But the Homologation of a deed of partition does not create privileges which did not exist, revive privileges that have been lost.

Per Se, Raoul's hypothec is posterior to that of Boullé, and therefore ought to rank, *a priori*, after that of Boullé. It is admitted that the minors' privilege as co partitioners is lost ; therefore the privilege of Raoul derived from the partition, held under no other title but the partition, is lost too; for the assignee has no greater privilege than his assignor, the creditor than the debtor whose rights he exercises.

Here, the minors would have lost all claim, save that of ordinary hypothec creditors if they had attained their majority, they are saved not because minority has revived or preserved their privilege of " co-partagents," but because minority has preserved for them a right of legal mortgage.

That right of legal mortgage does not belong to Raoul, has not been conveyed to Raoul, he is assignee of certain rights that the minors had, not of the privilege of legal mortgage.

If, therefore, the minors only recover because their minority has saved their personal privilege,

Raoul will assuredly not lose his money, because he has legal ways of recovering from them; but Raoul has no right to be collocated by privilege, by the force of a deed of partition which confers no privilege, or the privilege arising out of which has been lost.

He ought, therefore, not to have been collocated by preference to Boullé, an anterior inscribed hypothec creditor; but he might have been collocated "en sous ordre," as against the minors, and no doubt, would have been, if an Application had been made to that effect to the officer of the Court.

The minors tho' collocated for their share, must pay their personal creditors out of that share, and Raoul is, in virtue of the deed of partition, their personal creditor.

But the amount of the minors' collocation cannot be increased indirectly by letting in Raoul as a privileged creditor, when he and they have lost all their privilege as co-partitioners.

It is said that the minors' share was decreased by the deed of partition, so that Raoul might receive the amount due to him.

Be it so; and that is now the law of the parties; but they have suffered the privilege arising out of the partition, of which the homologation by the Court was but the final consummation, to be lost, and the hypothec creditors inscribed on the *Belle Ile* Estate have not suffered their right or rank to be lost.

To admit, now, Raoul's claim, as a privileged one, would be to revive the minors' privilege as co-partitioners, and that is on all sides admitted to be gone.

How can we confer upon Raoul, that other privilege entirely personal to the minors? that of minority, which saves their right in this case, as practically it may save Raoul's claim, but in some other way and by some other process.

We are bound, therefore, to order, reserving to Raoul all his rights as against the Heirs Viader, his debtors, that Raoul's collocation be struck out of the scheme of Distribution or "Ordre" and that its amount be attributed to the creditor next after Mrs Fontenay or to Mrs Fontenay herself, if her claim be not fully satisfied by her present allocation.

The decree appealed against shall be altered as to that point; as to the other point, the Appeal by Boullé against Mrs Fontenay's claim, we dismiss the appeal and confirm that lady's collocation. We find that Boullé fails on one Appeal and is successful on the other; the Respondents, on the other hand, who supported Raoul's allocation, and the reason why, is very plain, fail there, whilst they succeed as to the other point; we think, therefore, that this is a case in which each party should pay his own costs.

SUPREME COURT.

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VIOLATION DE DOMICILE,—POSSESSION,—DOMMAGES,—PREUVE TESTIMONIALE, — APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.

Celui qui réclame des dommages et intérêts pour violation de domicile doit prouver qu'il était en possession de l'Immeuble en question lorsque le Défendeur y a pénétré. Il n'est pas nécessaire de prouver, en pareil cas, la possession annale.

Les complices de celui qui a commis une violation de domicile sont responsables, au même titre, que le principal auteur du dommage; et une partie peut-être tenue pour responsable soit pour avoir ordonné, soit pour avoir approuvé, une violation de domicile, pourvu qu'elle ait été commise à son profit.

La défense "non coupable" implique simplement que le Défendeur nie avoir commis la violation de domicile alléguée, mais non que le Demandeur n'était pas en possession de la propriété en question ou tout autre fait qui justifie sa présence sur le dit Immeuble, lesquels moyens de défense doivent être spécialement énumérés.

Si le Défendeur plaide qu'il a droit de posséder la propriété en question, la Cour de District devient incompétente et ne peut juger la question.

Les clauses d'un mandat ne peuvent-être prouvés par temoins en toutes matières excédant 150 *francs, mais l'existence d'un mandat peut-être prouvé par témoins par un tiers.*

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TRESPASS,—POSSESSION,—POWER OF ATTORNEY,—PAROLE EVIDENCE, — DAMAGES, — APPEAL FROM A JUDGMENT OF THE DISTRICT COURT.

In order to maintain an action for trespass to land, the Plaintiff must prove that he was, at the time when the trespass was committed, in possession of the locus in quo. The allegation of an annual possession is not required in cases of trespass.

Both the party who committed the trespass and all aiding and abetting him are liable; and a person may become a trespasser by previous command or subsequent assent to the act, provided the trespass be committed for his use.

The plea of not guilty operates, merely, as a denial that the Defendant committed the trespass alleged in the place mentioned, but not as a denial of the Plaintiff's possession or to show a fact in justification, &c.; which several defences ought to be specially pleaded along with and immediately after the general issue not guilty.

If the Defendant intends to prove his right to the possession of the locus in quo, the District Court is ousted of its jurisdiction.

Third parties are entitled to prove the existence of a power, by parole evidence, but the contents of a written authority in a matter above 150 *francs cannot be proved by witnesses, between parties.*

HATCH,—Appellant,

versus

SUZOR,—Respondent.

—

Before:
His Honor the ACTING CHIEF JUDGE.

—

W. D. BOLTON,—Of Counsel for Appellant,
V LAVAL, —Appellant's Attorney.
L. ROUILLARD,—Of Counsel for Respondent.
L. DESPERLES, —Respondent's Attorney.

—

13*th December* 1867.

This is an Appeal from a Judgment given by the District Court of Grand Port, on an action directed against the now Appellant Hatch and one Thompson, for a trespass alleged to have been committed by Thompson, in the name, for the use and with authority of Hatch, on a land situate in the District of Grand Port, purchased by Suzor from one Mrs. Barbeau, by whom Suzor was alleged to have been put into possession, and to have been in possession at the date of the alleged trespass. For the wrong alleged to have been sustained by Suzor by such alleged trespass, the then Plaintiff and now Respondent Suzor claimed £50 damages.

Had the Plaint stopped here instead of proceeding, as it does, with the allegation made by the then Plaintiff and now Respondent, that at the time of the alleged trespass he had been in possession of the *locus in quo* for a year and a day, there would have been but little difficulty in determining the nature of the action brought.

But that allegation leads to the doubt whether the action brought be a mere action of trespass, or an action "in complaint" which required of the party ousted a possession of a year and a a day to be entitled to such an action; which possession, on the part of Suzor, was denied in the course of the argument, but not by a special plea to that effect.

This faultiness of the Plaint by the introduction of this unnecessary averment in an action of trespass is made worse by the plea of the then Defendant now Appellant Hatch.

To the charge of trespass the plea should have been "not guilty" and to this plea might have been added such other special plea or pleas required by the nature of the issue joined between parties.

Nothing of the sort was done. To the charge of trespass I find a plea of "not indebted," which is no answer to the trespass charged, but an answer to an action of debt which was not before the District Court.

It is true that the Plaint demands damages for the tort done, but these damages being consequential on the wrong sustained, the plea should have been a denial of the trespass alleged, which, unproved could not have given rise to any damages.

It has seldom, if ever, fallen to my lot, to read such informal proceedings: on the one hand, a Plaint mixing two actions calling for different kinds of proofs; and, on the other, a plea which does not traverse, either of the causes of action, but is a defence to an action not before the District Court.

However, on the commission of a trespass, the uppermost thought in the mind of the owner of the land trespassed upon and his most anxious wish must be to rid himself of the trespasser as quickly as possible. To this end the most expeditious mode of proceeding, in law, is an action in trespass. This action, I find, was brought by the then Plaintiff and now Respondent.

It is true that in the demand, the Plaintiff alleges that he had been in possession of the "*locus in quo*" for more than one year and one day. However, keeping in view the object contemplated by the Plaintiff, below, and the allegation of an annual possession not being required in trespass, I shall treat the allegation of annual possession as so much surplusage and deal with the action as one of trespass.

I shall therefore read the plea of "not indebted" "under the amended form of "not guilty," and ascertain how far the Defendant, below, and Appellant, here, has made out such a defence as would have justified the Magistrate in dismissing the Plaint which, on Appeal, it was contended should have been done.

In order to maintain an action for trespass to land, the Plaintiff, on his side, must prove *inter alia*:

1o. That he was at the time when the trespass was committed, in possession, either actual or constructive of the "*locus in quo*." Any possession is sufficient against a wrongdoer.

2o. The trespass must be proved.

Both the party who committed the trespass and all aiding and abetting him are liable, and a person may become a trespasser by previous command or subsequent assent to the act, provided the trespass be committed for his use. (Cox and LLOYD C. C. Pract: p 485)

The plea of "not guilty" on the side of the Defendant operates merely as a denial that the Defendant committed the trespass alleged in the place mentioned, but not as a denial of the Plaintiffs possession, which if intended to be denied must be traversed specially. (Rose: N. P. Ev. p 565.)

If the Defendant intended to prove his right to the possession or that he entered by command of one who had such right, in which case the District Court would be ousted of its jurisdiction, or intended to dispute the Plaintiff's possession,

or to shew any facts in justification, &c. these several defences should have been specially pleaded along with and immediately after the general issue "not guilty."

I find no plea on record to shew that the Plaintiff's possession was ever disputed, or that it ever was the Defendant's intention, in any way, to dispute it. No more was the situation of the *locus in quo* disputed.

Hence,it follows that at the time of the alleged trespass the Plaintiff was : 1o in possesion of the land trespassed upon in the District of Grand Port, and 2o That the *locus in quo* is within the jurisdiction of the Court from which the Judgment emanates.

So far, therefore, the plea to the jurisdiction of the District Court, whether on the ground of the *locus in quo* not being within the jurisdiction of the District Court of Grand Port, or on the other ground that the question of title had been raised in the Court below, must be overruled, because the record shews the *locus in quo* to be within the District of Grand Port and 2ly that the titles of either party were not looked at but for the purpose of ascertaining the right of the Plaintiff to obtain the Judgment prayed for.

For these reasons the plea to the jurisdiction must be and is accordingly overruled.

On the merits, I have the admission of Thompson, on cross-examination, of his having gone on the land of Suzor, the latter being then in possession thereof on the day stated in the Plaint, and of his having then and there done and caused certain acts to be done , that he, Thompson, however, went to the *locus in quo* in the name and for the use of Hatch, in virtue of a written authority, (which he could not produce on the trial) of a power of Attorney from Mr Hatch a co-proprietor of the said estate.

This admission of Thompson is important in this matter ; for it must be noticed that though sued with Hatch, the now Appellant, it is Hatch himself who called him as a witness, and thus afforded the Plaintiff the opportunity of establishing through his co-Defendant Thompson : 1o. the possession of Plaintiff ; 2o. the existence of the trespass by Thompson ; and 3o. the fact of the trespass having been committed in the name and for the use, by virtue of an authority written or not of the Appellant Hatch, a co-proprietor of the *locus in quo* ; and 4o. the existence of a certain amount of damages done to Suzor, the Respondent, by Thompson.

But it has been urged that the admission of Thompson, a co-Defendant of Hatch, in law is no evidence against Hatch. If so why did Hatch called him as a witness ?

Is he now to be allowed to repudiate that as illegal evidence, which was tendered by himself, because that evidence is adverse to his interest? This cannot be allowed. It has further been said : Thompson who alleges the existence of a written authority from Hatch, has produced no such authority ; therefore if trespass there be, Hatch is not to be responsible for acts which he never authorized before, nor sanctioned after, their commission by Thompson who, alone, must answer for any wrong he may have caused to Suzor.

There is no doubt, on the one hand, that parole evidence cannot be given of the contents of a written authority between parties in a matter above 150 Fcs., but there is no doubt, on the other hand, that third parties (in the position of Suzor) are entitled to prove the existence of a power, by parole evidence (C. C. Art. 1985 ;— Gilb : No. 206.)

Be it observed that no attempt was made by Hatch to get Thompson to explain that part of his deposition which militated against him. No examination was resorted to by Hatch, who must abide the consequences of his oversight or neglect in not re-examining Thompson.

This consequence is that he was rightly considered as a trespasser, by the District Court, he having, as proved by Thompson, given authority to the latter to enter upon the *locus in quo* in his Hatch's name and for his use.

This part of the Judgment must be and is accordingly supported.

But was the District Magistrate right in his assessment of the damages awarded against Hatch ?

The reason assigned by the Magistrate for the heaviness of the damages found against Thompson cannot apply to Hatch of whom Suzor never had to complain before, and Hatch in authorizing the entry of Thompson, may have directed him to do some act to assert his right in and over the *locus in quo*, such as preventing the removal of timber &c , but not the mischief complained of, which Thompson admitted having committed.

In upholding the Judgment of the Court below, I think it is but fair and reasonable, as far as Hatch is personally concerned, to reduce the amount of damages awarded to the sum of £ 10, as an indemnity to Suzor, for the wrong sustained by the latter through his Hatch's agent.

With the exception of this amendment in so far as Hatch is personally concerned, the Judgment of the District Court is affirmed, and the Appeal, therefore, dismissed, with costs.

SUPREME COURT.

INTERROGATOIRE SUR FAITS ET ARTICLES,—SERMENT DÉCISOIRE.

La Cour n'est pas tenue, sur la demande de l'une des parties en cause, d'ordonner que la partie adverse sera interrogée sur faits et articles, ou que le serment décisoire lui sera déféré ; elle peut accorder ou refuser cette demande suivant les circonstances dont elle a seule la libre appréciation.

La collocation de certains laboureurs indiens à un Ordre, pour le montant de leurs gages, étant contestée, et l'interrogatoire sur faits et articles de ces hommes étant demandé, la Cour a décidé que, dans l'espèce, le Jugement rendu en faveur des laboureurs, par le Magistrat Stipendiaire, étant déjà ancien de plusieurs années et les laboureurs, représentés par l'Avoué du Gouvernement, étant disséminés dans les différents Quartiers de l'Ile, absents ou morts, il n'y avait pas lieu de faire droit à la demande du Créancier opposant.

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PERSONAL INTERROGATORY,—DECISORY OATH.

The Court is not bound, upon the application of one of the parties to the suit, to order that the other party shall be called to be heard on his personal answers or that the point of fact at issue shall be referred to the decisory oath of the adverse party; this application may or may not be granted by the Court according to the justice of the case.

The Collocation of certain Indian labourers, to an Ordre, for the amount of their wages, being contested, and the interrogatory on personal answers of such labourers being asked for, the Court has ruled that in this case the Judgment of the Stipendiary Magistrate, on behalf of the labourers, having already several years' date, and the men being disseminated all over the Island, or dead, or having left the Colony, and being now represented by the Government-Attorney, the application of the contesting Creditor ought not be granted.

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MONTILLE,—Plaintiff,

versus

GOBURDHUN & ors.,—Defendants.

—

Before:

His Honor Mr. JUSTICE COLIN and
His Honor Mr. JUSTICE ARNAUD.

—

E. J. LECLÉZIO,—Of Counsel for Plaintiff.
J. H. SLADE, —Plaintiff's Attorney.
J. L COLIN, —Of Counsel for Defendants.
J. BOUCHET, —Defendants' Attorney.

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13*th December* 1867.

This was an appeal from a decree of the Master, under date 26th August 1867, in the matter of certain "Contredits" to the scheme of distribution of the sale price of *La Rosa* estate situate at Grand Port. According to that scheme, Goburdhun and other labourers on the estate had been collocated to receive: 1o. A sum of £1,495. 57, and again a further sum of £8,629.62, for wages due to them.

There was also brought up by the said appeal an objection to a collocation in favor of certain overseers or employés of the said estate, whose claims had been collocated by the Master, but were maintained by the appellant not to be covered by the privilege of "gens de service." At present it is unnecessary to advert more specially to that part of the case or even to the claims of the Indians to be privileged creditors *in rem*, in as much as the question which the Court has now to consider, and which arose pending the discussion of the merits of the cause, is one which though it may turn out to be of great importance in the case, stands a part and, as it were, disconnected from the general argument.

In the course of his arguments for the Appellants, E. LECLEZIO, *Junior*, stated that, if necessary, he would apply before the Supreme Court for the personal answers and even for the decisory oath of Goburdhun and the other Respondents. Although the question of the decisory oath was somewhat premature, as no Judgment had been or could be given on the merits of the cause until it had been decided whether personal answers should be allowed, the Court was pressed to give a Decision on the point, as in fact, the right alleged on one side and denied on the other to have recourse to such personal answers or decisory oath, turned a good deal on the same arguments and authorities. Counsel were therefore directed to confine themselves to these two points, subject to being further heard, if necessary, upon the merits.

Leclézio, *junior*, for Appellants, argued that he had the right to insist upon both personal answers and decisory oath, if necessary. Our case is that the Stipendiary Magistrate Watson received funds out of which he should have paid the Indians; and our case is that the Indians sanctioned all that he did, and we go further, took his acts as their own, and as we believe, got their money. There is no difference between an Indian labourer and other suitors; we have plenty of authority to show that we can have personal answers and a decisory oath even before an appellate jurisdiction. And why should we not? The other side says we show no sufficient ground; but we do show sufficient ground. As to conditions, the Court may impose conditions, but what will they be? Paying the money into the Court would be too harsh, my client is not an ordinary purchaser, being a creditor to a large amount.

J. COLIN for the Respondents: I cannot agree with my friend's argument as to his right. Art.67 of the Rules shows what that right is; it is a pure matter of discretion left to the Court and the Court will not use their discretion to defeat the rights of Indian labourers. Where can I now find them to bring them into Court; why were they not examined when they might and why are they only called on at the 11th hour, merely on account of the difficulty and inconvenience to bring them all here? Admit all my friend wishes to have, the privilege is not lost. I refer the Court to S. V. N. SIR: 8-2-722; and the same reasoning applies to the decisory oath. S. V. 31-2-341.

We never heard of this new step, being served a notice on us here on appeal; and does this notice tend to intimate that they want personal answers or an oath? not a bit, it refers only to

the existence of the Indians. But if they do not exist, how could we bring them up ; pay, and then money will be safe in the hands of the Curator, if in reality they have ceased to exist.

JUDGMENT.

The Appellant, Etienne Montille, is the purchaser of the Sugar Estate "*La Rosa*" which he bought for the sum of £26,000. An "Ordre" for the distribution of the sale price of the said Estate having been opened, the proper officer of the Court finally collocated in his scheme of distribution the Respondents, Indian labourers on that Estate, and, as such, holders of two Judgments given by the Stipendiary Magistrate of Grand Port, for the sum of 1st $1,495.57 and 2dly for the sum of £8,629,62. By these collocations the Appellant felt aggrieved and lodged his Appeal to the effect that they should be set aside and the amount of the sum ordered to be paid to himself as best entitled by the nature and rank of his privilege as a Creditor, to receive the same.

The Appeal brought up other collocations which it is not now necessary to inquire into.

The Appellants' Counsel, insisted that he had a right, even before the Supreme Court reviewing by appeal one of its officer's scheme of distribution, to call on the Respondents to give their personal answers (interrogatoire sur faits et articles.)

The learned Counsel also insisted that he had a right to refer the matter to the decisory oath of the Respondents, should the Appellants' arguments on the merits of the cause fail to convince the Court that the Indian labourers' collocation by the Master ought to be disturbed.

The personal answers now prayed for, and the decisory oath to which reference is made, were not applied for before the Master who heard the parties on their objection and gave his Decision upon the evidence laid before him.

It became necessary then, as the solution of these questions may have some bearing on the Decision of the cause on its merits, to determine whether or not under the circumstances of the case, the proof now for the first time tendered or rather applied for, ought to be let in.

It was strongly urged upon the Court that it was the absolute right of parties to a suit to call upon the other side to be examined upon personal answers at any stage of the proceedings, just as it was their right to refer the fate of the suit, in any case, to the decisory oath of the party.

As to personal answers, the right insisted on by the appellant is to be found in Arts. 324, 325 of the Code of Civil Procedure and Sect. 62 of the Rules of Court. The Rules on this point have done nothing but settle the practice in reference to the new organization of the Court, and in doing so, have laid down a rule which was easily gathered from the decisions of the Courts when called upon to apply the two above mentioned articles.

In neither the Rules nor in Arts. 324, do we find the absolute right to apply for personal answers respectively ; the law limits the application to the subject matter in question and provide that neither the trial nor the decision of the case can, in any wise, be delayed by such application.

A most important proviso, without which the right to apply for personal answers, would, in practice, be tantamount to a new way of impeding the recovery of claims or checking the legal process of a cause.

Hence it has been held that the Courts of law to which the application may be made were not bound to grant or refuse the same, but would act according as the justice of the case induced them to sanction or reject such application. That is exactly the force and meaning of Sect. 62 of the Rules.

This is so true that whilst prayers of this kind are now usually, in virtue of the Chamber's Ordinance, exparte made by application to the Judge in Chambers, as formerly they were made by petition, (Art. 325) it has been held, in France, that the party called upon to be interrogated upon personal answers, might lodge an opposition, the Court holding, hereby, clearly that the application was not granted as a matter of course and might, on good grounds, be refused. This has been laid down in *Robillard* v *Gilbert* C. N. 8.2.394, and by other Courts. MERLIN *Rep: opposit:* SS. I.—PIGEAU, *Com. I.* p. 584.—FAVARD, *Int: sur faits et articles* No. 7, adhere to that opinion which, although there are also commentators on the other side, seems to us to have in its support the weight of authority and of reasonning.

The main principle, itself, that the Judge may, even upon an exparte application, reject the prayer is, we believe, beyond a doubt : the very terms of the article show this "Sans retard de l'instruction ni du Jugement." Sect: 62 of the Rules, adopts the jurisprudence of the French Courts, on sufficient grounds shown ; and if this interpretation of the articles of the Code and of the rules required to be supported by authority, we find Decisions of the Supreme Court in France applying that very article, and in favor of the construction we put upon this question. The rule is laid down in this sense in a decision of the Cour de Cassation of 11th January 1815, in Re : *Grebet* v *de Lestranges & ors* S. 15 1.243, affirming on this point a Judgment of the Cour de Limoges.

Again in the case of *La Pecaudière* S. V. 15.1.160 affirming a Judgment of the Cour de Rennes ; *vide* also, CHAUVEAU sur CARRÉ, Art. 324.9.1232—PIGEAU *Com* : 1 p. p : 281, 282—*Berriat* and *Prin* v *Thénine Desmazures.*

Can the same principles apply to the decisory oath ? we read on Art : 1,360 of the Code Civil, that a party may submit the fate of the case to the decisory oath of the other side at any stage of the proceedings, "en tout état de cause ;" the same words used by Art : 324 Code Civil Procedure, as to personal answers; have then the

Courts here a similar discretionary power to that which they hold as to personal answers ?

If they have a discretionary power, it is certainly a more limited one ; for whilst Art : 324 distinctly enacts that personal answers shall not delay either the trial or the decision of the cause, Art. 1,360 contains no such proviso ; on the other hand the law contains no absolute enactment by which the Courts, when perfectly satisfied of the injustice of the application, of the grievances in the shape of vexatious delays which would spring from such an order, are bound, nevertheless, to compel parties to submit to such grievances.

If the law were peremptory, it must be obeyed ; but the law could not be, and has not been so peremtory as to compel the application of a principle, even in a case, where such application would be either impossible or so arduous as to leave the fate of a law suit " indéfiniment suspendu. " Therefore the jurisprudence of France, upon the article in question, whilst distinctly acknowledging that a Judge may not reject thé tendered decisory oath when the party tendering it is within the provisions of Arts: 1,358, 1359.1360 of the Code, has held that,at any rate, the suitor to whose oath the fate of the suit is referred, must not be in such a position that he cannot take the oath, " attendu " says the Cour de Douai, " que si le Juge ne peut refuser la délation du serment lorsqu'elle est requise sur un fait d'où dépend la décision du procès, il faut au moins que la partie à qui le serment est déféré ne soit pas dans l'impossibilité de l'accepter ou de le refuser.

The Cour de Cassation has gone further in *Cowe* v *Godard*, S. 29 I,369, it held, confirming a Judgment of the Court below, that " la " faculté laissée par les Art. 1,358, 1360 (Civil " Code) à la Justice n'est pas pour elle une loi " obligatoire dont l'observation entraine la nul- " lité de ses Jugements, mais qu'elle peut, au " contraire, en user ou n'en pas user suivant les " circonstances dont elle a seule la libre appré- " ciation." In the case of *Poirier* ch. 1830.2.381, the Court of Appeal of Bordeaux lays down the law in exactly the same way.

There are also several cases which, without going to the root of the question, have decided that it was for the Courts to judge of the nature of the oath tendered and that they might consider an oath tendered as a decisive oath to amount to no more than a supplementary oath, and reject it. S. V. 38 1.875.

We have, therefore, the very best authority to hold that the Courts have a certain amount of discretionary power in this matter and that they may decline to allow a decisory oath. We are of opinion that it is a power which ought to be used with the greatest care and that few are the cases in which it can safely be used ; but we are satisfied that altho' the occurrences must be very few, they may arise, and that it then becomes the duty of the Court to prevent by the exercise of that power crying evils fraught with oppression and injustice. We are of opinion that the first case which we have cited, that of the "Cour de Douai," gives a proper illustration of the discretionary power and a sound application of the general principle laid down by the Cour de Cassation. Supposing the oath to be really decisory, to be tendered to a suitor upon facts personal to himself, supposing in short all the conditions to be found, without which a decisory oath can never be applied, still it ought not to be ordered if the party who is to take it is so placed that it is impossible for him to take the oath or if the final decision sought to be obtained from such oath is to be on that account indefinitely suspended.

That being the law, we must now turn to the facts :

No cause is shown, no reason given by the Appellant why he did not make his application before the Master, nor is any fact proved to induce us to believe that the Appellant did not know what he believes he knows now. It is said that these Indian labourers are to be treated like ordinary suitors, certainly they are, unless where the law has enacted specific provisions for their protection, has created in their behalf specific privileges. They have specific privileges, there are specific provisions in their favor; but it is no where written that they may not be examined on personal answers or that a decisory oath may not be referred to them. On this point we have no doubt, but we must repudiate the theory set up by the Appellants that he is not an ordinary purchaser because he was a privileged creditor of the Estate sold; he is, to all intents and purposes, as to those who either have better privileges than his own or are entitled to receive at his hands any portion of the sale price; and should we have felt inclined to order personal answers to be given now at the eleventh hour, after Counsel had been in fact, at all events partly heard, we should not have granted the order except under the special condition that the amount of the Indians' collocation be paid into Court.

But we do not feel justified in granting an Order either for personal answers or even for a decisory oath, (since we have been pressed to give Judgment also as to the oath.) Where are these men now ? Several years have elapsed since they have been discharged. Are they all still in the Colony, are they all alive ? if so, in what district, on what Estates are they to be found, and when will a final decision be possible if all these labourers have to be sought for and found to be brought up and examined ? Why, the Appellant himself has served a notice, not whilst he was before the Master, not when he bought the Estate, but since he has been before this Court, to the effect that he doubts the existence of the men ; if they do not exist, how can they be examined or sworn ?

As to their money, if their claim be sustained on the merits of the case, our law has provided ; the Government-Attorney has charge of their cause ; if any have disappeared or died, the Curator of Intestate Estates will have charge of their recovered wages ; that, at any rate, may be matter for future consideration ; but where would be the justice of allowing this case to be postponed, probably *ad infinitum*, when it is openly stated to us that there is now a doubt even that they exist;

would it not, in reality be, as to personal answers, retarding both the Decision and the part heard argument of Counsel, as to the decisory oath, making an Order of the impossible execution of which there is a strong suspicion which we gather from the written admission of the Plaintiff, himself, an Order which, assuredly, will delay beyond all reasonable limits, the Decision of this case. If the purchaser of an estate sold at the Bar, could, in this manner, defeat the right of these Indian labourers, right which may or may not confer upon their creditors the privileges claimed in their name, but which are undoubted Judgment rights, the care with which the Legislature has provided for the welfare and the security of the wages of these labourers would be but a delusion.

Whether, then, these Indians have a better privilege over the sale price of the Estate than the Appellant, may be and is now the question on the merits; but that we ought not to delay our decision on that question by and on account of this very late application, that we ought not to delay it for a period which, from what we have heard on both sides, we cannot span, that we ought not, however, usually reluctant to do so, decline to exercise a discretionary power sanctioned by so many authorities, when declining to exercise it, would be, as it were, a denial of justice, of that we have, under the peculiar circumstances of this case, no doubt left in our minds. We reject, therefore, the two fold application of the Appellant who shall have to pay the costs of the day, and we direct the Counsel in this case, if they have to add to the argument which we have heard on the merits of this case, to proceed with such argument.

BAIL COURT.

ACTES DE SOCIÉTÉ.

L'omission de certaines formalités, prescrites par l'Art 42 du Code de Commerce, pour la validité des Actes de Société, ne peut être opposée par un tiers qui a acheté des marchandises d'une société et a pris livraison de ces marchandises.

PARTNERSHIP,—DEEDS OF COPARTNERY.

By Art. 42 of the Code of Commerce, certain formalities are to be observed for constituting a partnership, under pain of nullity "à l'égard des intéressés."

But a party who buys and obtain delivery of goods from a firm, cannot refuse to pay that firm because certain of the above mentioned formalities have not been fulfilled.

GOOLAM HOSSEN MAMODE & Co., Appellants,

versus

O. L. NARAINSAMY CHETTY & Co., Respondents.

Before The Honorable G. B. COLIN.

V. DELAFAYE, —Of Counsel for Appellants.
E. SAUZIER, —Appellants' Attorney.
C. M. CAMPBELL, —Of Counsel for Respondents
TH. HERCHENRODER,—Respondents' Attorney.

4th September 1867.

This was an Appeal entered against a Decision of the District Magistrate of Port Louis, given in favor of the Respondents, then Defendants, under the following circumstances:

The Plaintiffs, now Appellants, had brought an action to recover the sum of $123, being the balance of an account for goods sold and delivered by them to the Defendants.

The Plaintiffs, in the District Court, sued as partners, produced their deed of copartnery which the Defendants objected to because it had not been published, in terms of Art. 42 of the CODE which requires that an extract of the deed of copartnery should be transcribed in the registers of transcriptions of partnerships kept by the Registrar of this Court for the inspection of the public, and also requires that a similar extract be posted up for a certain time in the Hall of this Court.

Judgment was, thereupon, given in favor of the Defendants, with costs: Hence this Appeal which was argued by Delafaye whilst Campbell appeared to support the Decision of the District Court.

The points urged by the Counsel are all noticed in the Judgment of the Court.

JUDGMENT.

According to the Plaintiffs' allegation, they had sold and delivered goods to the Defendants who had paid a part of the price of such goods, but were still debtors in the sum of $123; to recover which the action was brought.

The Plaintiffs sued as partners and under the style of their copartnery.

They had to prove, it would appear, that they were partners, for otherwise it is difficult to conceive that the point started by the Defendants could have arisen; at any rate, to prove their case, one Cassime Hamode was called who stated himself to be a partner in the Plaintiffs' firm.

The District Magistrate dismissed the case, because a deed of copartnery was produced, of which an extract had not been duly transcribed.

The Supreme Court has had already occasion to lay down the law which is perfectly plain and elementary in matters of this description, but it appears that there is no reported decision to be found in the authentic Reports of this Court.

I have, therefore, although I should not other

wise have deemed it necessary, to delay Judgment in this case, been requested to give a *written* Judgment which I am now authorized by all the Judges of the Supreme Court to say, conveys, without a doubt, their opinion of the law.

Art: 42 of the CODE undoubtedly requires that an extract of deeds of co-partnery shall be transcribed in the Registry of transcriptions by the Registrar, and posted up in the Hall of the Court; the other formalities now printed in the New French Editions of the CODE as to publication of similar extracts in a newspaper which is to be certified by the Printer and legalised by the Mayor, are the law of France, since 31st March 1833, and do not form part of the law of this Colony.

The article further states that such formalities shall be observed under pain of nullity " à l'égard des intéressés, " and it goes on to say that " le défaut d'aucune d'elles ne pourra être opposé à des tiers par des associés. "

There is no nullity, therefore, except as to partners between themselves; what the law provides for as regards third party is, that the non fulfilling of such formalities shall not be set up by the partners against third parties; in other words that the partners may not avail themselves of their own negligence or disregard of the law so as to injure the rights of third parties.

If; therefore, A & B contract to be copartners and do not fulfil the formalities required by the law, *a priori* A & B may consider the copartnery as null and void; but if A pays or promises to pay a certain sum of money to become B's partner and does not fulfil the formalities required by law, he cannot set up that omission of his own, so as to say to third parties: " I am not partner, the deed is null." It is no where in the law said to be null as to third parties who may, if their interest leads them to do so, bind down the partners to the deed, without of course extending the liabilities arising out of the same, and no Court of law can create or extend nullities which are always penal by their nature.

But it is said, if partners cannot set up a nullity arising from their negligence against third parties, cannot third parties avail themselves of that omission, that disregard of the enactments of the law? It may well be that he who violates the law should not derive any advantage from his own wrong, but may not third parties draw some advantage from that wrong?

Assurodly when third parties to whom such publication in a place of public resort and in a Register specially kept for the inspection by and the information and protection of the public, may be of great importance, may, *coeteris paribus*, igonore a copartnery which has not been publish ed; let us take, for instance, the case of *Marcus* entering into copartnery with *Lucius* and yet not publishing or causing to be published the extract of his deed of co-partnery, a case may well arise when a creditor of *Marcus* might ignore the said copartnery and attach the funds of his debtor which either have served to form or are intended to form the copartnery's capital stock. Again if the deed of copartnery contained a derogation from the written law, that circumstance might, as a rule, be ignored by third parties; for publicity is intended mainly for third parties and the law says that from the want of publicity as traced out by its provisions, third parties shall not suffer.

But it does not follow that because partners cannot set up their own negligence so as to defeat the just rights of others, and may even suffer from such negligence, that others will have the right to set up such negligence to protect their own fraud or extend their rights. Third parties must not suffer, but they should not unduly profit by an illegality.

As a rule, it may safely be laid down with a distinguished writer, that if the formalities have been fulfilled " l'acte de société produit tous les effets dont il est susceptible soit entre les associés soit envers les tiers;" but if it have not been fulfilled, whilst the partners can derive no benefit from their omission or disregard of the law, as against third parties, third parties may often ignore the existence of the copartnery or bind down the partners to their deed, subject, of course, to such lawful modifications as the deed may have legally suffered.

There the Defendants bought goods of the Plaintiffs. When they took the goods, they acknowledged the Plaintiffs who sold in the name of Goolam Hossem Mamode & Co., to be a firm trading under that style, how could they now, when the time has come to pay for such goods, ignore that which they acknowledged when they took the goods?

Whether as between partners the nullity enacted by the law be relative or absolute may be a question; but as there is no nullity enacted as to third parties, as the law merely protects them against the objection that might be drawn by the partners, themselves, from the partner's own negligence, it stands to reason and is perfectly consonant with the spirit of the law as it is in harmony with every principle of justice, that if a shopkeeper buys from a firm, goods which he takes delivery of, admits therefore the existence of such firm, so, he cannot repudiate his admission, he cannot deny such existence when he is asked to pay the price agreed upon for such goods.

It was urged, in argument, that there was no proof that the Defendants took the goods. That is a pure question of fact, which the Plaintiffs sought to prove by evidence which, according to the District Court Ordinance, was perfectly legal evidence, evidence the weight of which the Magistrate, if he had heard it, would have been called upon to judge, but evidence which should have been heard. If the fact of the delivery of the goods had failed, there probably would have been an end of the case; if the fact had been sufficiently proved there should have been an end of the Defendants system of nullities.

I wish to be clearly understood not to give an opinion as to what might have been the result, if the Defendants, before taking the goods, had refused to acknowledge the existence of the

firm and declined the contract. The point does not arise here, and does not call, even incidentally, for a Decision; the question was and is: can one who buys and obtains delivery of goods from a firm refuse, subsequently, to pay that firm, because the deed of partnership of such firm has not been legally published?

I have no hesitation to hold, and my brother Judges entirely concur with me, that he may not do so under Art. 42 of the Code or any other law in force in this Colony.

That he is estopped by his own act and deed.

The Judgment of the District Court is reversed with costs.

COURT OF BANKRUPTCY.

FAILLITE—CERTIFICAT.

BANKRUPTCY—CERTIFICATE.

BANKRUPTCY A. COMPTY.

Before The Honorable Mr JUSTICE COLIN.

P. L. CHASTELLIER—Of Counsel for Bankrupt.
A. ROHAN, —Attorney for same.
L. ROUILLARD, —Of Counsel for Assignees.
E. DUCRAY, —Attorney for same.

15*th November* 1867.

In this case, after the Bankrupt had been examined, and witnesses heard, a certificate sitting was applied for and appointed to be holden on seventh October; on which day:

P. L. CHASTELLIER, for the Bankrupt, moved for a certificate;

L. ROUILLARD, for the Assignees, opposed the certificate.

A question of law arose in this case; the points urged by Counsel on both sides and which are noticed in the Judgment of the Court related solely to questions of fact connected with the dealings and conduct of the Bankrupt.

JUDGMENT.

This Bankrupt, has been strongly opposed by his trade-assignees, and assuredly, although some of the charges brought against him are not made out, there are transactions which have been left either totally unexplained or not sufficiently accounted for.

It appears to me clear and positive, that in October, November and the first half of December 1866, the Bankrupt purchased, from divers persons, goods to the amount of £20,500; he had, besides, at that time, his stock in trade; he has not paid the merchants of whom such goods were purchased; what has he done with those goods or the value thereof? Mr CHASTELLIER has explained and shown that in those months, he paid large sums of money; that is perfectly true and it is no less true, that a trader buys from one merchant and pays another, in the regular course of his dealings without the value of certain specific goods being directly applied to pay the original vendor of such goods.

But the explanation given, although covering a large sum of money, leaves a comparatively important balance unaccounted for, and there is no evidence tending to show that the Bankrupt's stock in trade was larger when he failed than at the time he made those last purchases, purchases large by themselves, but very considerable, indeed, when compared with the average amount of purchases and sales during the time of his regular trading. It is certainly stated and shown that whilst the Bankrupt's books show one payment made to Serendat, the vouchers show two payments, and thereupon, it is argued that similar omissions may have arisen which would account for the difference traced above. That is true; there may have been other such omissions; but it is the duty of the Bankrupt to show and prove the same, so as to explain away all suspicions of fraud; whose fault is it, if his books were negligently and carelessly kept? and if he could explain one omission by a reference to vouchers, it is to be presumed that he can explain other similar omissions by a reference to similar vouchers. That, he has not done; and when he fails to give such an explanation, the suspicion of fraud is not dispelled, is not lessened by the fact that just on the verge of Bankruptcy he made much larger purchases of merchandise than he had been accustomed to do before.

The charge that the book which ought to be the original book, the quasi Journal, was copied from another book which purports to be made out from the first, is not sufficiently borne out; the answer given seems to me to have a good deal of weight; if mistakes occur in one book, which are reproduced in another book, that is *per se* no reason to believe the first book to have been copied from the second, rather than the second from the first.

There is superabundant evidence that the books have been kept in a way which takes from them any confidence that they are intended to inspire; but it may be perfectly true, as is argued for the Bankrupt, that instead of keeping a regular Journal, he entered the monies he received, in his "débiteurs divers," first; no doubt, it occurs, that these entries are not reproduced in the waste-book; no doubt that throw in the case a confusion of which the Bankrupt must take the consequences, but on looking carefully at these Books, I have not sufficient evidence to lead me to be satisfied that a fraud was intended by the omissions in one book, the corrections in another.

But in my opinion, fraud, *à priori* appears

from the above purchases and the transactions to which I am now going to refer; and the *à priori* impression left by those transactions has not been explained away.

It appears that in April 1866, the Bankrupt received, from Chevalier, a sum of $786,23c; he does not account for that sum. He usually paid his money into the Bank and paid his creditors through the Bank: that sum was never paid into the Bank, contrary to his habitual course of dealings, he now says he paid that sum to creditors, amongst others to one Moladina $482,28c. But that is not true, for his book No 1, shows that on that day, $482,28c were paid to Moladina, but it is also shown by the Bank's returns, that it was through the Bank that £482,28 were paid on the 2nd April 1866. No such sum is twice paid, the one payment borne in book No 1 is precisely that which is referred to in the Bank's returns. Moladina was paid thro' the Bank; he did not get any part of the sum of £786,23 received from Chevalier, since that was never paid into the Bank, at all, and there is no other explanation tendered as to what became of that money. Again, the mortgage transaction with R. Comty, is not explained; in the balance sheet, R. Comty is borne as a holder of a mortgage of $2,000; if that is true R. Comty paid the $2,000, but here again, the money can no where be traced, nothing in the Books explains what has become of it. It does not appear to have been paid into the Bank nor to any creditor; the result is that either R. Comty is not a *bona fide* hypothec holder, which I may not presume, or that the Bankrupt has kept the money for his own private purposes. Lecacheur's transaction is also fraught with suspicion; it is extraordinary that Lecacheur who kept a shop separate from that of Comty, knows really nothing of his trade, cannot answer touching any particulars which are asked of him and yet remembers the exact sum of $390.96 of which was the value of his original stock in trade.

The Bankrupt gives different statements. On the first, he says the entry "Le Fonds du Magasin. Rue Condé, £390,80" in my books is merely a note of the capital with which Lecacheur began his trade. Why the bankrupt should keep note of Lecacheur's business if Lecacheur's business were not in reality his own, he explains solely by saying that Lecacheur had asked him to take a note of his monthly expenses. When referred to his cash book, all that is said to be a mistake. Lecacheur paid, the Bankrupt now says, by instalments; and why these words above mentioned were written he no longer recollects. The opinion left in my mind by the evidence, is that neither Comty nor Lecacheur are to be believed and that Lecacheur's shop was, and is, in reality, Comty's shop.

The evidence before me has brought me to the conclusion that a good deal of money received by the Bankrupt has not been accounted for, and that the omissions, incorrect entries in his books, are not sufficient to destroy the force of such evidence.

That the Bankrupt wilfully falsified his books to cause entries of accounts to appear which have no existence, I am not sufficiently convinced. That in his Sundry Debtors' books, entries appear of a certain date prior to entries purporting to be of an older date, is plain, but that invariably appears on the off leaves of the books which were used for that purpose by the Bankrupt. The "Repertoire," also, bears the names of these parties, *ex. grat.*, Henry Darné, who bought in 1865, after the name of *ex. grat.*, Duponsel who bought in 1866. The explanation given is, that these accounts had been intended to be paid at once and were not entered; as they were to be entered as cash payments they were not paid. The Bankrupt waited, and, at last, when his shop was seized and he had to bring his books he entered such accounts where he had room in the off leaves of his Sundry Debtors books and also last on the "Repertoire." This certainly shows a most careless and reckless system of doing business and keeping books, but although the circumstance struck me as very suspicious at first, on examination, I find that the explanation given, may be and probably is true. It is not easy to perceive why for the sake of those few and mostly paltry accounts, the books should have been falsified: these additional accounts leave the case absolutely where it was before and throw no light on the main transactions complained of by the assignees. Besides, other books bear out the explanation. In the account of "Aly, Chinois" (one of those things complained of) there is a payment, "à valoir," of $30, on 8th March 1865. In the waste book, and at his proper place, that very sum appears to have been paid by Aly. The case is the same as to Soupraya Chetty's account. Clearly it was wrong not to open to those parties credit and debit accounts, when no cash payment was really effected; but between that and the wilful and fraudulent falsifying of the books, there is an abyss. It is also true that the circumstances which prove Aly and Soupraya's accounts to be correct, may not be found as to some other accounts similarly situated, that is entered in the sundry debtors' book, after other accounts, but whilst there really was no motive to enter in the books such petty accounts if not really due; (for what possible advantage could the Bankrupt derive therefrom), they all stand in the same position as Aly accounts entered too late and carried upon the unwritten off leaves of the book, and, therefore, also carried last in the "Répertoire." There is no attempt made to interpolate them, in the "Répertoire," at their proper date.

Nor does the evidence bear out the charge laid against the Bankrupt, that he caused certain goods to be surreptitiously taken out of his shop after Bankruptcy. When the fact complained of took place, the shop was out of Bankrupt's possession; it had been seized, and there is no evidence, at all, to connect with the Bankrupt the people who were seen taking goods away. This circumstance, again, was very suspicious, deserved well to be strictly inquired into, was duly inquired into, but the evidence, here fails.

The testimony of Vincent George, one of the assignees, however, and the facts he there discloses, connected with the receipts and payments of the Bankrupt, shows that he has to account for many sums which neither the books nor his

explanations can help the Court to trace; I have noticed the three apparently most important ones, Chevalier, R. Comty and Lecacheur's cases; I cannot bring myself to the conclusion that mere ignorance in book keeping and mere carelessness can suffice to turn aside the plain deduction from those facts, and that is that the Bankrupt has received money and purchased goods which are not forthcoming for the benefit of his creditors. The consequence is that I must refuse the certificate prayed for and the application is dismissed, with costs.

SUPREME COURT.

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COMPETENCE,—SOCIETÉ,—ARBITRAGE FORCÉ.

L'employé qui reçoit, en outre de ses appointements fixes, un tant pour cent sur les bénéfices, n'est point un associé dans le sens de l'Art. 51 *du Code de Commerce qui établit que toutes contestations entre associés, et pour raison de la société, seront jugées par des arbitres.*

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JURISDICTION,—PARTNERSHIP,—COMPULSORY ARBITRATION.

A clerk who, over and above his fixed salaries, is allowed a per centage on the profits, is not a partner as fixed by Art. 51 *of the Code of Commerce which states that all disputes amongst copartners and arising on account of the copartnership, shall be determined by arbitrators.*

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Before:

His Honor MR. JUSTICE COLIN and
His Honor MR. JUSTICE ARNAUD.

—

BRÉARD,—Plaintiff,

versus

HEWETSON,—Defendant.

—

L. ROUILLARD,—Of Counsel for Plaintiff.
E. DUCRAY, —Plaintiff's Attorney.
HON. V. NAZ, —Of Counsel for Defendant.
H. BERTIN, —Defendant's Attorney.

19th December 1867.

The question for the consideration of the Court is solely a plea to its jurisdiction.

The facts stand thus:

The Plaintiff was the owner of a carting establishment in "Passage Monneron;" he made an agreement with the Defendant whereby he agreed to hand over his carting material and premises to the Defendant, and he was personally to be employed in the new concern and to receive, besides, a monthly salary, a per centage in the profits. He now claims a sum of $285.25c. for per centage due according to a certain account which is produced, and a sum of $3,000 for the use of the material which, it is alleged, has been kept by Defendant, beyond the expiration of the agreement, and used by him.

To this demand the Defendant answers that the agreement in question has established between him and the Defendant a partnership, and asks to be sent before arbitrators, according to law.

The question, therefore, turns upon the construction of the agreement of the 10th of June 1863, and from it we are to gather whether a partnership has been intended between the contracting parties.

We are of opinion that such a partnership has not existed. From the agreement between parties, we gather that the Plaintiff could not go on with his business and was glad to make it over to the Defendant, on condition that he should be relieved from his engagements, his liabilities, and, at the same time to find remunerative employment; that, on the other hand, the Defendant undertook to set up an establishment of his own on the premises, "dans lequel Mr. Héwetson va organiser un établissement de charrois."

We can see nothing in the agreement between parties which might lead us to the conclusion that a partnership was intended. The fact that the Plaintiff was to receive certain percentage from the net profits of the concern in which he was to have been employed is the only one from which a partnership would have to be inferred; but we do not think that the circumstance, standing by itself, is sufficient to lead us to such conclusion. We overrule, therefore, the plea of jurisdiction and order the parties to proceed on the merits.

ALPHABETICAL LIST OF CASES

REPORTED IN THE COLLECTION OF 1867.

PLAINTIFFS AND DEFENDANTS.

ALPHABETICAL LIST OF CASES

REPORTED IN THE COLLECTION OF 1867.

DEFENDANTS AND PLAINTIFFS.

ALPHABETICAL LIST OF MATTERS